IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. _____

CLAUDE D. BALLEW,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

ROBERT EUGENE SMITH, Esq.
1409 Peachtree St., N.E.
Atlanta, Georgia 30309
Attorney for Petitioner.

Of Counsel:
MICHAEL CLUTTER, Esq.
1409 Peachtree St., N.E.
Atlantia, Georgia 30309

The Paul M. Harrod Company, Baltimore, Maryland 21234

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The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on April 6, 1976.

OPINION BELOW

The opinion of the Georgia Court of Appeals is not yet reported, but a copy thereof is set forth in Appendix A hereto.

JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on April 6, 1976. An application for rehearing was timely filed and denied on May 6, 1976. Copy of said denial is set forth in Appendix B hereto. Thereafter, the Supreme Court of Georgia denied a timely filed Petition for Writ of Certiorari on July 9, 1976. Copy of said denial is set forth herein in Appendix C. Mr. Justice Powell granted an extension of time to and including December 6, 1976 within which to file this Petition. The Court's jurisdiction is invoked under Title 28 United States Code §1257(3).

QUESTIONS PRESENTED

1. Whether a jury comprised of five persons is sufficient to afford to an accused in a criminal prosecution the right to trial by jury granted by the Sixth and Fourteenth Amendments to the United States Constitution?

2. Whether jury instructions on *scienter* allowing a finding of "constructive knowledge" in an obscenity case are sufficient to meet the constitutional minimum standards of *scienter* set forth in *Hamling v. United States*, 418 U.S. 87 (1974)?

3. Whether the motion picture film "Behind the Green Door" can, as a matter of law, be held obscene or whether it constitutes speech protected by the First and Fourth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Sixth, and Fourteenth Amendments to the United States Constitution, as well as Article VI, Section XVI of the Georgia Constitution (Georgia Code Annotated §2-5101) and an Act Establishing the Criminal Courts of Atlanta (Georgia Laws 1890-91, Volume 2, p. 935, as amended by Georgia Laws 1935, Volume 2, p. 498) are set forth in Appendix D hereto.

STATEMENT

Petitioner was convicted in the Criminal Court of Fulton County on two counts of distributing obscene materials, the charges being predicated upon two exhibitions of the motion picture film "Behind the Green Door" at the Paris Art Theatre in Atlanta, Georgia. Petitioner was alleged to have been an employee of the theatre at the time the film was exhibited.

Prior to his trial, Petitioner filed several motions in the Criminal Court of Fulton County, including a Motion to Impanel a Twelve-Person Jury in the Superior Court of Fulton County, alleging that the five-person juries provided in the Criminal Court of Fulton County are unconstitutional. All of Petitioner's motions were denied.

Petitioner was then tried before a five-person jury in the Criminal Court of Fulton County and found guilty on both counts. He thereafter appealed his conviction to the Georgia Court of Appeals which affirmed the trial judgment in all respects in a judgment and opinion for which review is sought by this Petition.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS FOR REVIEW AN ISSUE EXPRESSLY RESERVED BY THIS COURT IN *WILLIAMS V. FLORIDA*, 399 U.S. 78 (1970) – THE MINIMUM NUMBER OF JURORS REQUIRED TO GUARANTEE THE CONSTITUTIONAL RIGHT TO JURY TRIAL IN CRIMINAL CASES.

The as yet undecided status of the issue here presented for review – the minimum number of jurors necessary to guarantee the constitutional right to a trial by jury in criminal matter – was explicitly recognized in *Williams v. Florida*, 399 U.S. 78 (1970). The *Williams* case presented two issues of major import, one of them dealing with the Sixth Amendment right to jury trials as applied to the States through the Fourteenth Amendment.

Williams was convicted of robbery in a Florida State Court, his judgment of conviction being predicated upon a verdict of guilty returned by a six-person jury. Prior to his trial, Williams had sought to empanel a twelve-person jury, challenging the Florida State statute which provides for six person juries in all but capital cases. His motion was denied and the issue of the constitutionality of juries comprised of less than twelve persons was therefore presented in this Court.

The Court first of all noted that the Sixth Amendment right to trial by jury in criminal cases had been made applicable to the States through the Fourteenth Amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968). It was noted that, pursuant to

Duncan, the Fourteenth Amendment guarantees an accused in state criminal trials the right to a jury in all cases which would invoke such a right if tried in federal court. Williams' robbery trial clearly fell within the scope of the *Duncan* holding. See *Baldwin v. New York*, 399 U.S. 66 (1970) and *De Stefano v. Woods*, 392 U.S. 631 (1968).

Having noted that the Sixth Amendment right to jury trial in criminal matters was thus applicable, this Court went on to decide whether that concept of "trial by jury" necessarily required a state jury of twelve persons:

> "The question in this case then is whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number – in this case, 6." 399 U.S., at 86.

The Court rejected the Petitioner's contention and held that, in order to adequately guarantee the constitutional right to jury trial in criminal matters, States need not provide for juries of exactly twelve persons:

> "We hold that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that respondent's refusal to empanel more than 6 members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth." *Id.*

In thus deciding that a twelve-person jury is not constitutionally mandated, however, this Court did not determine what minimum number would be required to guarantee this Sixth Amendment right. Indeed, that question was expressly reserved:

> "We have no occasion in this case to determine what minimum member can still constitute a 'jury,' but we do not doubt that 6 is above that minimum." 399 U.S., at 91 n.28.

The fact that the question was left unresolved in *Williams* was expressly noted by the Georgia Court of Appeals in rejecting Petitioner's argument in this case. The failure of this Court to determine what minimum number can still constitute a "jury" was cited below as, *inter alia*, the justification for rejection of Petitioner's argument at the State level:

> "The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a 'jury.' In Williams v. Florida, 399 U.S. 78, 92, 90 S.Ct. 1893, 1901, 26 L.Ed.2d 446 (Fn. 28) it is observed 'We have no occasion in this case to determine what minimum number can still constitute a "jury," but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts." *Ballew v. State*, ____ Ga. App. ____, ____ S.E.2d ____, quoting *Sanders v. State*, 234 Ga. 586, 216 S.E.2d 838.

The instant Petition squarely presents the issue for final resolution by this Court. Whatever the outcome, it is respectfully submitted that the open-ended uncertainty precipitated by the *Williams* footnote should be eliminated. As was noted by Mr. Justice Harlan in *Williams*, *supra*:

> "The court's elaboration of what is required provides no standard and vexes the meaning of the right to a jury trial in federal courts, as well as state courts, by uncertainty . . . . The uncertainty that will henceforth plague the meaning of trial by jury is itself a further sufficient reason for not hoisting the anchor to history." 399 U.S., at 126.

It is also necessary to delineate the minimum number required to safeguard the Sixth Amendment guarantee of trial by jury in order to eliminate the "slipper slope" recognized by the Court in *Williams*, *supra*:

> "The *Thompson* opinion also reasoned that if a jury can be reduced from 12 to eight, then there was nothing to prevent its similarly being reduced to four or two or even zero, thus dispensing with the jury altogether. See 170 US at 353, 42 L Ed at 1067. That bit of logic, resurrected today in Mr. Justice Harlan's concurring opinion, post, at 126, 26 L Ed 2d at 468, suffers somewhat as soon as one recognizes that he can get off the slippery slope before he reaches the bottom." 399 U.S., at 91 n.28.

When viewed in light of the purposes of the jury trial right, it cannot be doubted that the jury of five provided for the Petitioner in this case was insufficient. It has been recognized that among the purposes of a jury trial in criminal matters is that of interposing members of the community between corrupt or overzealous prosecutors and compliant judges:

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." 391 U.S., at 156.

This purpose was expounded upon by this Court in *Williams* which noted that the jury also serves the purpose of providing the common sense judgment of the community:

> "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." 399 U.S., at 99.

The Court in *Williams*, although failing to reach the issue of the required minimum, did enunciate the principles to be applied in that determination:

> "[T]he number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." *Id.*

When judged against these criteria, the five-person jury provided by the Georgia statute here under review must be found wanting. Statistical studies subsequent to the *Williams* decision have adequately established that smaller juries are significantly less representative of minority positions. *See, e.g.*, Zeisel, *The Waning of the American Jury*, 58 A.B.A. Journal 367; Diamond, *A Jury Experiment Reanalyzed*, 7 Mich. Journal of Law Reform 520; Zeisel and Diamond, *Convincing Empirical Evidence*, 41 University of Chicago Law Review 281.

If the purpose of a jury is to interpose the conscious of the community between the prosecutor and a compliant judge, a broad cross-section must be afforded in order to assure that the compliant judge is not merely replaced by a single compliant juror with the ability to determine guilt or innocence.

Group deliberation and group dynamics necessitate at least the six-person minimum found constitutionally acceptable in *Williams*.

II.

THE JURY INSTRUCTIONS ON THE ISSUE OF *SCIENTER* FAILED TO MEET THE MINIMUM CONSTITUTIONAL STANDARDS ENUNCIATED BY THIS COURT IN *HAMLING V. UNITED STATES*, 418 U.S. 87 (1974).

The jury which tried Petitioner instructed in an improper manner upon the issue of *scienter* or knowledge on the part of the Petitioner. As to the issue of knowledge, the jury was instructed as follows:

> "[T]he word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge of the obscene content if he has the knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material."

The instruction to return a verdict of guilty upon a finding of "constructive knowledge" is patently erroneous when the current constitutional minimum standards of *scienter* are considered. The most recent decision of this Court on the requirements of *scienter* is *Hamling v. United States*, 418 U.S. 87 (1974). There, the Court states:

> "We think the 'knowingly' language of 18 U.S.C. § 1461 and the instructions given by the district court in this case satisfy the constitutional requirements of

> scienter. It is constitutionally sufficient that the prosecution show that the defendant had knowledge of the contents of material he distributes, and that he knew the character and nature of the materials."

As the above decision clearly demonstrates, the Constitution requires a finding of actual rather than constructive knowledge. The requirement of actual knowledge is necessary to eliminate the chilling effect which will flow from any lesser standard. *Smith v. California*, 36' U.S. 147 (1959). As the Court stated in *Mishkin v. New York*, 383 U.S. 502 (1966):

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent to the definition of obscenity."

• The present constitutional minimum standard of *scienter* clearly requires actual knowledge. The trial Court erroneously instructed the jury that a finding of guilty could be predicated upon constructive knowledge.

The Court of Appeals rejected Petitioner's argument in this regard by noting that the instruction is in accordance with Georgia statutes. This overlooks the fact that the argument is constitutionally based and that a statute may not authorize that which the Constitution forbids. Petitioner's argument in this regard is predicated upon rights derived from the First and Fourteenth Amendments to the United States Constitution. Since these rights may not be abrogated by any state statute, reliance upon the authorization of the statute does not answer Petitioner's constitutional objections.

The present constitutional minimum standards of *scienter* clearly require actual knowledge. The trial Court erroneously instructed the jury that a finding of guilty could be predicated upon constructive knowledge as well as actual knowledge. Petitioner's conviction must, therefore, be reversed.

III.

THE MOTION PICTURE FILM "BEHIND THE GREEN DOOR" UPON WHICH PETITIONER'S CONVICTION RESTS IS AN ARTISTIC WORK OF NATIONAL ACCLAIM WHICH MAY NOT, AS A MATTER OF APPLICABLE CONSTITUTIONAL LAW, BE HELD OBSCENE SINCE IT CONSTITUTES EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court is respectfully requested to independently review the alleged obscenity of the motion picture film upon which Petitioner's conviction is predicated. The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injunctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter. This Court reversed in a judgment announced by Mr. Justice Harlan.

The Court thought the dispositive question to be whether or not the magazines were in fact obscene. 370 U.S., at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of obscenity. The Court, however, decided against remanding the case for an initial determination of the obscenity issue below:

> "Whether this question [of obscenity] be deemed one of fact or of mixed fact and law, see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S., at 488.

The Court decided that the determination of that issue must ultimately rest with it:

> "That issue, involving factual matters entangled in a constitutional claim, see Grove Press, Inc. v. Christenberry (CA 2 NY) 276 F2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio motion picture theatre operator for possessing and exhibiting the film "The Lovers." On appeal, this Court reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day, supra*, states:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. United States, supra, 354 US, at 497-498, 1 L ed 2d at 1541, 1515 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id., at 498, 1 L ed 2d at 1514; see Manual Enterprises, Inc. v. Day, 370 US 478, 488, 8 L ed 2d 639, 647, 82 S Ct 1432 (opinion of Harlan, J.)." 378 U.S., at 188.

It was noted that the duty of appellate review is not a pleasant one, but it was held to be one which must be exercised:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be unconsistent with our duty to uphold the constitutional guarantees." 378 U.S., at 187-188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since the film "The Lovers" was not obscene. This conclusion as to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed by this Court only recently in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

The Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity *vel non* of the nationally acclaimed motion picture film "Behind the Green Door" upon which Petitioner's conviction rests.

In any independent review, the past findings of this Court on the sole issue of obscenity have obvious bearing. In this respect it is important to note that findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicit depictions or descriptions of sexual activities, including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity. *See, e.g., Memoirs v. Massachusetts*, 383 U.S. 413 (1966) ("Fanny Hill"); *Aday v. United States*, 388 U.S. 447 (1967) ("Sex Life of a Cop" described at 357 F.2d 855); *Corinth Publications v. Westberry*, 388 U.S. 448 (1967) ("Sin Whisper" described at 146 S.E.2d 764); *Mazes v. Ohio*, 388 U.S. 453 (1967) ("Orgy Club"); *Hoyt v. Minnesota*, 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other books); *Grove Press v. Gerstein*, 378 U.S. 577 (1964) ("Tropic of Cancer").

In the area of motion picture films, this Court has reversed findings of obscenity as to films which depict totally nude women; films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing pubic and rectal area; and films depicting lesbian sexual activity and hetero-sexual activity between men and women. Moreover, this Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity as to a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess*, 429 F.2d 416 (CA 9 1970), *affirmed sub nom. Pinkus v. California*, 400 U.S. 922 (1970).

When the nationally acclaimed motion picture film "Behind the Green Door" is considered as a whole and judged against press materials of a similar or more explicit nature heretofore determined by this Court not to be obscene, the conclusion is inescapable that the film constitutes protected speech under the First and Fourteenth Amendments to the Constitution of the United States. It should be so held and Petitioner's conviction should thus be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Court of Appeals.

Respectfully submitted,

ROBERT EUGENE SMITH, Esq.
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Attorney for Petitioner.

Of Counsel:

MICHAEL CLUTTER, Esq.,
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

APPENDIX "A"

51795. BALLEW (C. D.) v. THE STATE. W–33

WEBB, Judge.

Claude Ballew appeals his conviction on two counts of distributing obscene materials in violation of Criminal Code § 26–2101. The conviction involved the exhibitions on November 9 and 26, 1973 at an Atlanta theatre of motion picture films entitled "Behind the Green Door." Ballew enumerates thirteen alleged errors, consolidated on argument into six issues.

1. The first is that the film is not obscene under applicable constitutional law. We were requested to make an independent appellate review of the film and make our own determination of obscenity *vel non*.

Our Constitution provides that both of our appellate courts are"for the trial and correction of errors of law . . ." Art. VI, Sec. II, Pars. IV and VIII (Code Ann. §§ 2-3704, 3708). There is no constitutional provision for an independent appellate determination of the weight of evidence, and it seems to have been well settled that the appellate court's review as to evidence is limited to its legal sufficiency, not its weight. *Proctor v. State*, 235 Ga. 720, 721 (221 SE.2d 413); *Ridley v. State*, Ga. (SE.2d) (#30426, Feb 2, 1976). Even so, our Supreme Court has made de novo independent reviews of movie films to decide the constitutional fact of obscenity without reference to the "trial and correction of errors of law" constitutional limitation. *Slaton v. Paris Adult Theatre I*, 231 Ga. 312, 318 (201 SE.2d 456, 413 U.S. 49, 93 SC 2628, 37 LE2d 446), *Dyke v. State*, 232 Ga. 817 (209 SE.2d 166) (cert. denied by U.S. Supreme Court April 28, 1975).

Our view has been that we are limited to a determination of whether there was sufficient evidence to support the jury's verdict. The Supreme Court of the United States held, however, that on appeal in an obscenity case the appellate court cannot merely decide whether there was sufficient evidence to support a finding by the jury that the material is obscene, but must review independently the constitutional fact of obscenity and make a determination of such *vel non*. *Miller v. California*, 413 U. S. 15, 25 (93 SC 2607, 37 LE.2d 419); *Jenkins v. Georgia*, 418 U.S. 153, 160 (6) 164 (94 SC 2750, 41 LE.2d 642, 650, 652). That Court held that juries do not have unbridled discretion in determining what is patently offensive, and the jury's verdict does not preclude all further appellate review of an accused's assertion that his film was protected by the First and Fourteenth Amendments.

This issue of independent review had been invoked earlier in *Jacobellis v. Ohio*, 378 U.S. 184, 188 (84 SC 1676, 12 LE.2d 793, 798) wherein Mr. Justice Brennan stated: "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law [cit. omitted]. Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' "

Mr. Justice Brennan also said that failure to independently review would be "an abnegation of judicial supervision. . . inconsistent with our duty to uphold the constitutional guarantee."

Our own Supreme Court stated in *Dyke v. State*, 232 Ga. 817, 821, supra: "We are not bound to approve the jury's finding that this film is obscene, since it is clear the United States Supreme Court has determined that an independent appellate review must be made of the material to decide the constitutional fact of obscenity."

Our duty to uphold the constitutional guarantees is no less than that of the justices of the respective supreme courts of the United States and of this State, and although we abhor even the suggestion of censorship we nevertheless viewed an exhibition of this film in its entirety. Our purpose was two-fold; to determine if there was sufficient evidence to support the verdict; and, in accordance with the decisions of those courts cited hereinabove (which in our opinion exceed our constitutional appellate review limitation) to decide by an independent appellate review the constitutional fact of obscenity vel non. "[T]here comes a point where this Court should not be ignorant as judges of what we know as men."[1]

Section 26–2101(b) of the Criminal Code in effect at the time of the violations[2] provided: "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

The film, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest. It is without redeeming social value, and it is a shameful and morbid exhibition of nudity with particular and all-encompassing emphasis on sexual acts. It goes substantially beyond customary limits of candor in representing and portraying nudity and sex. The film presents patently

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[1] Mr. Justice Frankfurter in *Watts v. Indiana*, 338 U.S. 49, 52, SC , 93 LE 1801, 1805. See *Bryon v. Felker*, Ga. App. (SE) (No. 51675, decided Jan. 28, 1976).

[2] The law was amended in 1975 and broadens somewhat the definition of obscene materials. Ga. L. 1975, p. 498.

offensive exhibitions and representations of ultimate sexual acts and manipulations, normal and perverted. It shows unabashedly offensive and lewd views of the genitals of both male and female participants, and is replete with portrayals of individual and group acts of masturbation, cunnilingus, fellstio and sexual intercourse. It is degrading to sex. Except for the opening and a few other scenes toward the conclusion, it is rank, hard core pornography, and each exhibition in the theatre was "a public portrayal of hard core sexual conduct for its own sake, and [presumably] for the ensuing commercial gain." *Miller v. California*, 413 U.S. 15, 35 supra. The film "Behind the Green Door" is obscene as a matter of constitutional law and fact, and is unprotected by the First and Fourteenth Amendments. *Miller v. California*, 413 U.S. 15, 23, supra; see also, *Liles v. Oregon*, 543 P.2d 698, 44 LW 3623 (cert. den. by United States Supreme Court May 3, 1976, 75–983).

2. Ballew's second contention is that the evidence was insufficient to support the verdict. We do not agree.

The film, obviously, is the best evidence of what it represents, and having been before the trial court no other affirmative evidence is necessary to determine its obscenity *vel non*. Examining the record and viewing a projection of the film, we conclude that the jury's determination that the picture was obscene was supported by the evidence. *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 56, supra; *Hamling v. United States*, 418 U.S. 87, 100, 94 SC 2887, 41 LE.2d 590, 610. "Sex and nudity may not be exploited without limit by films or picutres exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." *Miller v. California*, 413 U.S. 15, 25, supra.

Ballew asserts, however, that the evidence was insufficient to connect him, beyond a reasonable doubt, with the exhibition of this film, " Behind the Green Door." The theatre he managed

was an "adult theatre, and the film was advertised on the marquee. He was present when the film was exhibited on the dates of his arrest. On at least one of the occasions involved herein he sold tickets, and pressed a button to allow entrance into the seating area. He checked the cash register and locked the door after each arrest.

In *Dyke v. Georgia*, 232 Ga. 817, 822, supra, "Appellant furhter argues the evidence is legally insufficient to sustain his conviction for exhibition of this film because it failed to show he had control over the showing of the film or knowledge of its content. The evidence shows that the film was advertised on the marquee of the theatre managed by appellant and that the threatre was an 'adult theatre.' Appellant was shown to be on the premises when the film was exhibited on the two separate dates charged in the accusation and, on the second occassion, appellant sold tickets for admission to see it. This was sufficient for the jury to conclude that on each occasion appellant at least aided and abetted in the exhibition of the film. See Code Ann. § 26–801."

We also reject Ballew's assertion that the evidence failed to prove guilty knowledge by him of the nature of the film. Under Criminal Code § 26–2101(a) "knowing" as used therein "shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject–matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." See *Dyke v. State*, at page 822, and cases cited.

3. The next argument is that the trial judge improperly instructed the jury as to the law so as to deny him his constitutional rights guaranteed by the First, Fifth and Fourteenth Amendments. An examination of the various charges complained of, however, reveals that they as a whole comport with Criminal Code § 26–2101, and those approved in *Dyke v. State*, 232 Ga. 817, supra, and *Slaton v. Paris Adult Theatre I*,

231 Ga. 312 supra. One charge complained of was a quotation of the definition of obscene material as set forth in § 26–2101. There is no merit in this complaint.

4. Error is charged on the Court's denial of Ballew's motion to supress the motion picture film because the search warrants were issued upon affidavits allegedly insufficient to supply probable cause. This same contention was made in *Dyke v. Georgia*, 232 Ga. 817, 823, 824, supra. The affidavits upon which the two search warrants were issued herein contain rather accurate and full factual descriptions of representative scenes on the film, and were sufficient to show probable cause for issuance of the warrants.

5. Ballew contends his conviction on two counts in the accusation were but a single transaction and his conviction thereon violated his constitutional rights against double jeopardy as guaranteed by the Fifth Amendment and the Georgia Constitution. Interestingly, this same argument was made in *Dyke v. Georgia*, 232 Ga. 817, 827, supra, counsel for Ballew having been counsel for Dyke.

Here, the accused was first arrested for showing the film on November 9, and the film was seized under the search warrant. The accused waived commitment hearing. Subsequently, the accused was arrested on another warrant for showing the same picture, from another copy of the film, on November 26. The statement of Mr. Justice Ingram in the *Dyke* case (232 Ga. at pages 827, 828) is equally applicable here. "Appellant argues that the accusation charged him in two counts of violating the same statute and that the proof involved a regularly scheduled showing of a motion picture in a theatre with no disruption in scheduling. The exhibition of the film on two separate dates, appellant argues, does not permit the state to 'pyramid' the charges and punishment against him. . . but that is not the case here. There were two distinct episodes involving different dates of exhibition and even different copies of the same film. This record shows two criminal violations, not a single crime." So it is in this case.

6. Lastly, appellant complains that he was denied his right to jury trial under the Sixth and Fourteenth Amendments by being tried before a five–person jury in the Criminal Court of Fulton County.

This contention was ruled upon in *Sanders v. State*, 234 Ga. 586 (216 SE.2d 838) (cert. denied by U.S. Supreme Court Feb. 23, 2976) wherein the Supreme Court said: "We reject this argument in view of Gerogia authority to the contrary. See *McIntyre v. State*, 190 Ga. 872 (5) (11 SE.2d 5). The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a 'jury.' In *Williams v. Flordia*, 399 U.S. 78, 92 (Fn. 28) it is observed: 'We have no occasion in this case to determine what minimum number can still constitute a "jury," but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five–man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts."

We find no error and affirm the trial court. Deen, P. J., and Quillian, J., concur.

APPENDIX "B"

GEORGIA COURT OF APPEALS

May 6, 1976

51795. BALLEW (C. D.) V. THE STATE W–33

Please substitute the attached new page 7 for that previously furnished in the opinion rendered in the above case on April 6, 1976. The judgement is not affected and the motion for rehearing is denied.

APPENDIX "C"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta July 9, 1976

Dear Sir;

Case No. 31362 *Claude Davis Ballew v. The State.*

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS,
Clerk

APPENDIX "D"

Constitutional and Statutory Provisions

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . abridging the freedom of speech, or the press . . . "

2. The pertinent provisions of the Sixth Amendment are:

   "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . "

3. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Article VI, Section XVI of the Georgia Constitution *(Georgia Code Annotated § 2–5101)* provides:

   "The right of trial by jury except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior court."

States has not determined what minimum number of jurors can still constitute a "jury." In *Williams v. Flordia*, 399 U.S. 78, 92, 90 S.Ct. 1893, 1901, 26 L.Ed.2d 446 (Fn.28) it is observed "We have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum." Absent a holding by the United States Supreme Court that a five–man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts.

We find no error for any reason enumerated and argued in this appeal and affirm the trial court. See *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (cert. denied by U.S. Supreme Court April 28, 1975).

Judgement affirmed.

All the Justices concur, except GUNTHER, J., who concurs in the judgment only.

JOINT APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-761

CLAUDE D. BALLEW,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

PETITION FOR CERTIORARI FILED DECEMBER 3, 1976
CERTIORARI GRANTED JANUARY 25, 1977

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JOINT APPENDIX

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NO. 76-761

CLAUDE D. BALLEW,
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v.

STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

RELEVANT DOCKET ENTRIES

		Date
1.	Accusation filed	September 14, 1974
2.	Trial commenced	May 22, 1975
3.	Judgment of conviction entered	May 28, 1975
4.	Amended Motion for New Trial filed	September 3, 1975
5.	Amended Motion for New Trial denied	September 29, 1975
6.	Notice of Appeal filed	October 29, 1975
7.	Case docketed in Ga. Court of Appeals	November 26, 1975
8.	Oral Argument held in Ga. Court of Appeals	February 4, 1976
9.	Conviction affirmed in Ga. Court of Appeals	April 6, 1976
10.	Petition for Rehearing filed	April 14, 1976
11.	Petition for Rehearing denied	May 6, 1976
12.	Petition for Certiorari filed in Ga. Supreme Court	June 4, 1976

13.	Certiorari denied in Ga. Supreme Court	July 9, 1976
14.	Justice Powell extends time for filing Petition for Writ of Certiorari to December 6, 1976	September 28, 1976
15.	Petition for Writ of Certiorari filed	December 3, 1976
16.	Response to Petition filed	December 30, 1976
17.	Certiorari granted	January 25,1977

ACCUSATION

IN THE CRIMINAL COURT OF FULTON COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CASE NO. 133873
	)	
	)	
CLAUDE DAVIS BALLEW,	)	ACCUSATION
	)	
Defendant	)	

STATE OF GEORGIA, FULTON COUNTY

Came in person before me Charles R. Little who, being duly sworn, deposes and says on oath that from the best of his knowledge and belief Claude Davis Ballew is guilty of the offense of MISDEMEANOR, in that the said accused in the County of Fulton, on the 9th day of November, 1973, did commit the offense of distributing obscene materials in violation of Georgia Code Section 26-1201 in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled "Behind the Green Door" that contained obscene and indecent scenes, which materials considered as a whole and applying contemporary community standards predominantly appeals to the prurient interest, in a patently offensive depiction and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion, and goes substantially beyond customary limits of candor in describing or representing such matters; and said film taken as a whole lacks serious literary artistic, political or scientific value and is utterly without social redeeming value. The date alleged herein in an essential averment to this transaction. Contrary to Law.

Count #2: I, Charles R. Little in the name and behalf of the citizens of Georgia, charge and accuse Claude Davis Ballew with the offense of Misdemeanor, for that the said accused in the County aforesaid, on the 27th day of November, 1973, did commit the offense of distributing obscene materials in violation of Georgia Code Section 26-2101 in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled "Behind the Green Door", that contained obscene and indecent scenes, which material considered as a whole and applying contemporary community standards predominantly appeals to the prurient interest, is a patently offensive depiction and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion, and goes substantially beyond customary limits of candor in describing or representing such matters; and said film taken as a whole lacks serious literary artistic, political or scientific value and is utterly without social redeeming value. The date alleged herein is an essential averment to this transaction. Contrary to Law.

Georgia, charge and accuse Claude Davis Ballew with the offense of MISDEMEANOR, for that the said accused in the County aforesaid, on the 9th day of November, 1973 did commit the offense of distributing obscene materials in violation of Georgia Code Section 26-2101 in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled "Behind the Green Door" that contained obscene and indecent scenes, which materials considered as a whole and applying contemporary community standards predominantly appeals to the prurient interest, is a patently offensive depiction and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion, and goes substantially beyond customary limits of candor in describing or representing such matters; and said film taken as a whole lacks serious literary artistic, political or scientific value and is utterly without social redeeming value. The date alleged herein is an essential averment to this transaction. Contrary to Law.

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JURY CHARGE

IN THE CRIMINAL COURT OF FULTON COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CASE NO. 133873
	)	
	)	
CLAUDE DAVIS BALLEW,	)	
	)	
Defendant	)	

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY: This Accusation charges Claude Davis Ballew with the offense of a misdemeanor. The charge being that the said accused, in the County of Fulton, and State of Georgia, on the 9th day of November, 1973, did commit the offense of a misdemeanor, in that the offense of distributing obscene materials in violation of Georgia Code Section 26-2101, in that the said accused did, knowing the obscene nature thereof, distribute a motion picture film entitled, "Behind the Green Door." That contained obscene and indecent scenes, which material, considered as a whole and applying contemporary community standards, predominantly appeals to the prurient interest embodying – is a patently offensive depiction and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion, and goes shame – and goes substantially beyond customary limits of candor in describing or representing such matters. And said film, taken as a whole, lacks serious literary, artistic, political or scientific value, and is utterly without social redeeming value.

The date alleged herein is an essential averment to this transaction, contrary to law.

Now, I have just read to you, Ladies and Gentlemen of the Jury, Count One of this Accusation.

I will now read Count Two of this Accusation.

I, Charles R. Little, in the name and behalf of the citizens of Georgia, charge and accuse Claude Davis Ballew, with the offense of a misdemeanor; for that the said accused, in the county aforesaid, on the 27th day of November, 1973, did commit the offense of distributing obscene materials in violation of Georgia Code Section 26-2101, in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled, "Behind the Green Door," that contained obscene and indecent scenes, which material, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest; is a patently offensive, morbid – is a patently offensive depiction and description of sexual conduct embodying a shameful or morbid interest in nudity, sex and excretion. And goes substantially beyond customary limits of candor in describing or representing such matters, and said film, taken as a whole, lacks serious literary, artistic, political or scientific value, and is utterly without social redeeming value. The date alleged herein is an essential averment to this transaction, contrary to law.

Now, to both Counts of this Accusation, Ladies and Gentlemen of the Jury, the defendant pleads, not guilty. And that forms the issue that you are to try in this case.

Now, I charge you, Ladies and Gentlemen of the Jury, that the defendant is presumed in law to be innocent of this charge, and that presumption remains with him throughout the trial, until and unless overcome by evidence sufficient to satisfy your minds beyond a reasonable doubt as to his guilt.

I charge you further, Ladies and Gentlemen of the Jury, that the burden is upon the State to remove this legal

presumption of innocence by proving the defendant guilty beyond a reasonable doubt.

Now, I charge you further, Ladies and Gentlemen of the Jury, that a reasonable doubt means just what it says. It is not a capricious or arbitrary doubt, nor a doubt which does not arise from a consideration of the evidence, but a doubt growing out of the evidence or from a lack of the evidence or from a conflict of the evidence. If, after considering all the facts and circumstances of the case, under all the evidence in the case, your minds are waivering, unsettled, unsatisfied, that is the doubt of the law, then you should acquit the defendant. But if that doubt does not exist as to the guilt of the defendant, then you should convict the defendant.

Now, I charge you further, Ladies and Gentlemen of the Jury, that you are made by law the exclusive judges as to the credibility of the witnesses in this case. Now, in passing upon their credibility you may consider all the facts and circumstances of the case. The witnesses manner of testifying; their intelligence; their interest or want of interest; their means and opportunity for knowing the facts to which they testified; the probability or improbability of their testimony, and also their personal credibility so far as the same may legitimately appear from the trial of the case.

Now, I charge you further, Ladies and Gentlemen of the Jury, that the law also directs you that it is your duty where it can be done to reconcile conflicting evidence if there be such evidence in this case, so all of the witnesses will be made to speak the truth, and perjury will be imputed to none of them. But if there be any evidence in this case in such irreconcilable conflict that this cannot be done, then it will be your duty to believe that evidence which is most reasonable and most credible to you under all of the circumstances and the evidence in the case.

Now, Ladies and Gentlemen of the Jury, I charge you further that freedom of expression is fundamental to our system, and has contributed much to the development and well-being of our free society. In the exercise of the

Constitutional Rights to free expression which all of us enjoy, sex may be portrayed and the subject of sex may be discussed freely and publicly so long as the expression does not fall within the area of obscenity. However, the Constitutional Right of free expression does not extend to the expression of that which is obscene.

Now, Ladies and Gentlemen of the Jury, I charge you further that the guarantee of the Constitution is not confined to the expression of ideas or emotions that are conventional or shared by the majority.

Now I also charge you further, Ladies and Gentlemen of the Jury, that a film is not obscene merely because it attractively depicts a relationship which is contrary to the religious or moral precepts of the community.

Now, Ladies and Gentlemen of the Jury, I charge you further, that if the predominant appeal of the motion picture film in question herein, taken as a whole, is an appeal to the normal interest in sex of the average person, the Jury should acquit the accused.

Now, Ladies and Gentlemen of the Jury, I charge you further, that a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise dissiminates to any person, any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent to do so, provided that he – the word, 'knowing,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge of the obscene content if he has the knowledge of facts which would put a reasonable prudent man on notice as to the suspect nature of the material.

Ladies and Gentlemen of the Jury, the Court will correct itself in using the word here. The word was 'work' in the charge here. And I will correct that part of it. The word, 'word'. I mean, 'word.' I should have used, 'work.'

Now, then, 'B' of 26-2101: Material is obscene if considered as a whole, applying community standards, it's predominant appeal is to the prurient interest; that it is a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value. And if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters.

Now, I charge you further, Ladies and Gentlemen of the Jury, that the opinions of experts may be offered by either side on any question of science, skill trade or like question, and is admissible. And such opinions may be given on the facts as proved by other witnesses. And in this instance, on the facts as proved by the showing of the film.

The testimony of an expert who has been qualified as to his opinion of such is admissible if the opinion given relates to scientific or technical knowledge. The weight of such testimony, and whether it is applicable to the proved facts under investigation is a question for the Jury.

Now, Ladies and Gentlemen of the Jury, in weighing the evidence in a case, you may consider all the facts and circumstances of the case. The witnesses manner of testifying, their intelligence. Their means and opportunity of knowing the facts to which they testify. The nature of the facts to which they testify. The probability or improbability of their testimony. Their interest in the outcome of the case or their lack of interest in the outcome of the case. And also their personal credibility insofar as the same may legitimately appear upon the trial of the case. The weight and credit that the Jury will give to any person offered as an expert witness

is solely a matter for the Jury to determine. It is a matter for you to determine as to whether that the things that the person offered as an expert testified to, were in fact matters that were at issue in this case.

Now, Ladies and Gentlemen of the Jury, the Court charges you that in misdemeanor cases all who participate in the commission of the same criminal act, in the execution of the common intend, are legally contemplated to, or in legal contemplation equally guilty.

Now in misdemeanor offenses all who procure, compel, command, aid or abet in the commission of a misdemeanor are regarded by the law as a principle offender and may be accused as such either in an Accusation which jointly accuses all of those who participated in the offense or in separate act. Accusations against the various individuals who may be connected with the commission of the offense. Whether the Accusation is joint or several, any particular defendant accused in an Accusation of having committed a misdemeanor offense, may be convicted by proof either that he directed or personally committed the act, or that he procured, counseled, commanded, aided or abetted the criminal transaction of another who was the direct and immediate actor.

Now Number One, Ladies and Gentlemen of the Jury, the essential elements of the offense are: *First*, that the average person, not a sick person, not a highly trained person, not a professional person dealing with it, but an average man and woman in the community that constitutes the Community of Georgia, applying contemporary community standards, would find that the motion picture charged, taken as a whole, appeals to the prurient interest in sex.

Now, then, second: The motion picture charged herein is a patently, offensive description of sexual conduct embodying a shameful or morbid interest in nudity, sex or excretion.

Thirdly: That the motion picture we're trying here, taken as a whole, lack serious literary, artistic, political or scientific value.

And fourth: That the film is totally or utterly without redeeming social value.

Additionally, that the defendant did the act with knowledge, and the Court has charged you that knowledge should be the knowledge of a prudent person. Whether he knew it actually or should have known it, constructive knowledge, that a prudent person under the facts and circumstances as given by the witness here, should have known of the nature of the film being exhibit, that it was obscene and he intended to exhibit the film. You have to find beyond a reasonable doubt that he intended to exhibit the film or that he aided, counseled, abetted and participated in the exhibition of the film, or the intent to exhibit it with the knowledge of its content, with the knowledge that its contents were obscene within the definition of obscenity under Georgia law, or that he as a reasonable prudent man, considering the circumstances, should have known.

Now I charge you, Ladies and Gentlemen of the Jury, obscene material. And all of the circumstances surrounding the exhibition or the offering of the exhibition of the same. In this case, it is the film.

Now, in determining whether the material predominantly appeals to a shameful and morbid interest in sex, excretion or nudity, and whether the said material is patently offensive because it goes substantially beyond the customary limits of candor in describing or representing certain matters, you must consider what, by a general co-census of the Community of Georgia as a whole, would be offensive to the common instincts of decency or people generally.

Now the Court charges you further, Ladies and Gentlemen of the Jury, that the burden is upon the State to establish beyond a reasonable doubt that the material alleged to be obscene by the State in this Accusation, must as a whole, appeal predominantly to the prurient interests in sex, excretion or nudity, that is to say, that the predominant appeal of such material is to a shameful or morbid interest in sex, excretion or nudity. And that the materials are patently offensive because they go substantially beyond the customary limits of candor in describing or representing such matters. And that the materials are utterly without social value. All of these elements must be present and united at the same time. They must coalesce and co-exist.

A motion picture is not obscene merely because it depicts relationships which are contrary to your religious precepts or the religious precepts of the community as a whole.

Now, Ladies and Gentlemen of the Jury, this Accusation against this defendant is not evidence of guilt, and carries no presumption of guilt. It is merely the contentions of the State, setting forth the elements of the offense with which the defendant is charged.

No writing or entry on this Accusation may be considered by you as evidence in this case. It will be out with you and you may refer to it in order only to determine what the issues are between the State and the defendant.

I charge you further, Ladies and Gentlemen of the Jury, that it is the duty of the jurors after the Charge of the Court had been submitted to you, and while you are deliberating, to discuss and consider the opinions of each other. But each one of you must decide this case upon your own individual opinion of the evidence and upon your own individual judgment and conscious.

In order to convict this defendant of the offenses with which he is charged, your verdict must be unanimous.

Now, Ladies and Gentlemen of the Jury, in giving you these instructions the Court does not undertake to intimate that the community as used in this statute which I have read to you, and in this Accusation on which this defendant is being tried, is that community or political entity which is the State of Georgia. In other words, the standard for obscenity under the law that this defendant is alleged to have violated, is gauged by the standards that prevail in the State of Georgia.

Now, I charge you further, Ladies and Gentlemen of the Jury, that the State is not required to introduce into evidence or to offer into evidence, witnesses to render an opinion as to whether this film is obscene or not obscene. The Jury is to make up their minds as to the obscenity of this picture within the definition of the Georgia law, based upon the evidence in the case. This film itself is sufficient for this Jury to make that determination.

Now, I charge you further Ladies and Gentlemen of the Jury, that in this connection what is obscene material is determined by the sensibilities and the moral standards of the people or community as a whole. And that is that the Community of Georgia as evolved from generation to generation along with our civilization. What is obscene in one period may not be obscene in another period of our civilization. Whether one commits a violation of the Georgia law as heretofore given you in this charge, depends upon the time, the place, the manner by which one exhibits or offers to do the same or otherwise disseminates the alleged nor express any opinion as to what has or what has not been proven in this case. The Court gives you these principles of law to guide you in considering the facts in the case, but the Court recognizes that it is in the province of the Jury to

make decisions as to all matters of fact. And the Court gladly and properly leaves to you, Ladies and Gentlemen of the Jury, the decision as to all matters of fact. I can only say to you again as I have said to you heretofore, that the issue in this case is formed by the charges made by this Accusation against this defendant. And this defendant's plea of not guilty thereto.

Now upon the issue thus formed you will take into consideration all of the evidence in the case. All of the facts and circumstances in the case. And in this manner you will ascertain for yourselves what the truth is with reference to this charge. And when you have reached a conclusion as to what the truth is, let it be expressed in the verdict which you return in this case.

Now, Ladies and Gentlemen of the Jury, if you believe beyond a reasonable doubt that the defendant, in the County of Fulton, and State of Georgia, at anytime within the two years immediately preceding the date of the swearing out of this Accusation, did, in the County of Fulton, and the State of Georgia, on the 9th day of November, 1973, and this is Count One, commit the offense of distributing obscene materials in violation of the Georgia Code Section 26-2101, in that the said accused did knowing the obscene nature thereof, exhibit a motion picture film entitled, "Behind the Green Door," that contained obscene and indecent scenes which materials considered as a whole and applying contemporary community standards, predominantly appeals to the prurient interest; is a patently offensive depiction and description of sexual conduct, embodying a shameful or morbid interest in nudity, sex and excretion, and goes substantially beyond customary limits of candor in describing or representing such matters, and said film, taken as a whole, lacks serious literary, artistic, political or scientific value, and is utterly without social redeeming value, the date alleged herein is an essential averment to this transaction, contrary to law, and as charged in this Accusation, then and in that event you would be authorized to find the defendant guilty.

If you do not believe the defendant guilty, or if you should entertain a reasonable doubt as to his guilt, then you should acquit.

Now, Ladies and Gentlemen of the Jury, in Count Two, if you believe beyond a reasonable doubt that the defendant in the County of Fulton, and the State of Georgia, at anytime within the two years immediately preceding the date of the swearing out of this Accusation, did, on the 27th day of November, 1973, and I'll read Count Two to you now.

"I, Charles R. Little, in the name and behalf of the citizens of Georgia, charge and accuse Claude Davis Ballew, with the offense of a misdemeanor, for that the said accused, in the county aforesaid, on the 27th day of November, 1973, commit the offense of distributing obscene materials in violation of the Georgia Code Section 26-2101, in that the said accused, did, knowing the obscene nature thereof, exhibit a motion picture film entitled, "Behind the Green Door," that contained obscene and indecent scenes, which material considered as a whole and applying contemporary community standards, predominantly appeals to the prurient interest; is a patently offensive depiction and description of sexual conduct, embodying a shameful or morbid interest in nudity, sex and excretion. And goes substantially beyond customary limits of candor in describing or representing such matters, and said film, taken as a whole, lacks serious literary, artistic, political or scientific value, and is utterly without social redeeming value. The date alleged herein is an essential averment to this transaction; contrary to law, and as charged in this Accusation, then in that event you would be authorized to find the defendant guilty on Count Two.

If you do not believe the defendant guilty on Count Two, or if you entertain a reasonable doubt as to the defendant's guilt on Count Two, then you should acquit the defendant.

Now, Ladies and Gentlemen of the Jury, and this is a matter of illustration only. In case you convict the defendant in Count One, the form of your verdict would be, "We, the Jury, find the defendant, guilty, on Count one." In case you acquit the defendant the form of your verdict would be, "We, the Jury, find the defendant, not guilty, on Count One."

Now, Ladies and Gentlemen of the Jury, and this is still a matter of illustration only. And in case you convict the defendant in Count Two, the form of your verdict would be, "We, the Jury, find the defendant, guilty on Count Two." In case you acquit the defendant, Ladies and Gentlemen of the Jury, the form of your verdict would be, "We, the Jury, find the defendant, not guilty, on Count Two."

Now, Ladies and Gentlemen of the Jury, your verdict should be in writing on the back of this accusation, using the printed form at the bottom of the page.

It should be dated and signed by one your number as Foreman, and returned into open Court.

You may now retire, Ladies and Gentlemen of the Jury and consider your verdict.

Now, I will instruct you not to start considering your verdict till you hear from the Court.

OPINION OF THE GEORGIA COURT OF APPEALS

April 6, 1976

GEORGIA COURT OF APPEALS

51795. BALLEW (C.D.) v. THE STATE. W–33

WEBB, Judge.

Clause Ballew appeals his conviction on two counts of distributing obscene materials in violation of Criminal Code §26-2101. The conviction involved the exhibitions on November 9 and 26, 1973 at an Atlanta theatre of motion picture films entitled "Behind the Green Door." Ballew enumerates thirteen alleged errors, consolidated on argument into six issues.

1. The first is that the film is not obscene under applicable constitutional law. We were requested to make an independent appellate review of the film and make our own determination of obscenity *vel non.*

Our Constitution provides that both of our appellate courts are "for the trial and correction of errors of law . . ." Art. VI, Sec. II, Pars. IV and VIII (Code Ann. §§ 2-3704, 3708). There is no constitutional provision for an independent appellate determination of the weight of evidence, and it seems to have been well settled that the appellate court's review as to evidence is limited to its legal sufficiency, not its weight. *Proctor v. State,* 235 Ga. 720, 721 (221 S.E.2d 413); *Ridley v. State,* Ga. (SE.2d) (#30426, Feb. 2, 1976). Even so, our Supreme Court has made de novo independent reviews of movie films to decide the constitutional fact of obscenity without reference to the "trial and correction of errors of law" constitutional limitation. *Slaton v. Paris Adult Theatre I,* 231 Ga. 312, 318 (201 SE.2d

456, 413 U.S. 49, 93 SC 2628, 37 LE2d 446), *Dyke v. State*, 232 Ga. 817 (209 SE.2d 166) (cert. denied by U.S. Supreme Court April 28, 1975).

Our view has been that we are limited to a determination of whether there was sufficient evidence to support the jury's verdict. The Supreme Court of the United States held, however, that on appeal in an obscenity case the appellate court cannot merely decide whether there was sufficient evidence to support a finding by the jury that the material is obscene, but must review independently the constitutional fact of obscenity and make a determination of such *vel non*. *Miller v. California*, 413 U.S. 15, 25 (93 SC 2607, 37 LE.2d 419); *Jenkins v. Georgia*, 418 U.S. 153, 160 (6) 164 (94 SC 2750, 41 LE.2d 642, 650, 652). That Court held that juries do not have unbridled discretion in determining what is patently offensive, and the jury's verdict does not preclude all further appellate review of an accused's assertion that his film was protected by the First and Fourteenth Amendments.

This issue of independent review had been invoked earlier in *Jacobellis v. Ohio*, 378 U.S. 184, 188 (84 SC 1676, 12 LE.2d 793, 798) wherein Mr. Justice Brennan stated: "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law [cit. omitted]. Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' "

Mr. Justice Brennan also said that failure to independently review would be "an abnegation of judicial supervision . . . inconsistent with our duty to uphold the constitutional guarantee."

Our own Supreme Court stated in *Dyke v. State*, 232 Ga. 817, 821, supra: "We are not bound to approve the jury's finding that this film is obscene, since it is clear the United States Supreme Court has determined that an independent appellate review must be made of the material to decide the constitutional fact of obscenity.

Our duty to uphold the constitutional guarantees is no less than that of the justices of the respective supreme courts of the United States and of this State, and although we abhor even the suggestion of censorship we nevertheless viewed an exhibition of this film in its entirety. Our purpose was two-fold; to determine if there was sufficient evidence to support the verdict; and, in accordance with the decisions of those courts cited hereinabove (which in our opinion exceed our constitutional appellate review limitation) to decide by an independent appellate review the constitutional fact of obscenity vel non. "[T]here comes a point where this Court should not be ignorant as judges of what we know as men."[1]

Section 26–2101(b) of the Criminal Code in effect at the time of the violations[2] provided: Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

---

[1] Mr. Justice Frankfurther in *Watts v. Indiana*, 338 U.S. 49, 52, SC 93 LE 1801, 1805. See *Bryon v. Felker*, Ga. App. (SE) (No. 51675, decided Jan. 28, 1976).

[2] The law was amended in 1975 and broadens somewhat the definition of obscene materials. Ga. L. 1975, p. 498.

The film, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest. It is without redeeming social value, and it is a shameful and morbid exhibition of nudity with particular and all-encompassing emphasis on sexual acts. It goes substantially beyond customary limits of candor in representing and portraying nudity and sex. The film presents patently offensive exhibitions and representations of ultimate sexual acts and manipulations, normal and perverted. It shows unabashedly offensive and lewd views of the genitals of both male and female participants, and is replete with portrayals of individual and group acts of masturbation; cunnilingus, fellatio and sexual intercourse. It is degrading to sex. Except for the opening and a few other scenes toward the conclusion, it is rank, hard core pornography, and each exhibition in the theatre was "a public portrayal of hard core sexual conduct for its own sake, and [presumably] for the ensuing commercial gain." *Miller v. California,* 413 U.S. 15, 35 supra. The film "Behind the Green Door" is obscene as a matter of constitutional law and fact, and is unprotected by the First and Fourteenth Amendments. *Miller v. California,* 413 U.S. 15, 23, supra; see also, *Liles v. Oregon,* 543 P.2d 698, 44 LW 3623 (cert. den. by United States Supreme Court May 3, 1976, 75-983).

2. Ballew's second contention is that the evidence was insufficient to support the verdict. We do not agree.

The film, obviously, is the best evidence of what it represents, and having been before the trial court no other affirmative evidence is necessary to determine its obscenity *vel non.* Examining the record and viewing a projection of the film, we conclude that the jury's determination that the picture was obscene was supported by the evidence. *Paris Adult Theatre I. v. Slaton,* 413 U.S. 49, 56, supra; *Hamling v. United States,* 418 U.S. 87, 100, 94 SC 2887, 41 LE.2d 590, 610. "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public

accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." *Miller v. California,* 413 U.S. 15, 25, supra.

Ballew asserts, however, that the evidence was insufficient to connect him, beyond a reasonable doubt, with the exhibition of this film, "Behind the Green Door." The theatre he managed was an "adult theatre, and the film was advertised on the marquee. He was present when the film was exhibited on the dates of his arrest. On at least one of the occasions involved herein he sold tickets, and pressed a button to allow entrance into the seating area. He checked the cash register and locked the door after each arrest.

In *Dyke v. Georgia,* 232 Ga. 817, 822, supra, "Appellant further argues the evidence is legally insufficient to sustain his conviction for exhibition of this film because it failed to show he had control over the showing of the film or knowledge of its content. The evidence shows that the film was advertised on the marquee of the theatre managed by appellant and that the theatre was an 'adult theatre.' Appellant was shown to be on the premises when the film was exhibited on the two separate dates charged in the accusation and, on the second occasion, appellant sold tickets for admission to see it. This was sufficient for the jury to conclude that on each occasion appellant at least aided and abetted in the exhibition of the film. See Code Ann. § 26-801."

We also reject Ballew's assertion that the evidence failed to prove guilty knowledge by him of the nature of the film. Under Criminal Code § 26-2101(a) "knowing" as used therein "shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." See *Dyke v. State,* at page 822, and cases cited.

3. The next argument is that the trial judge improperly instructed the jury as to the law so as to deny him his constitutional rights guaranteed by the First, Fifth and Fourteenth Amendments. An examination of the various charges complained of, however, reveals that they as a whole comport with Criminal Code §26-2101, and those approved in *Dyke v. State*, 232 Ga. 817, supra, and *Slaton v. Paris Adult Theatre I*, 231 Ga. 312 supra. One charge complained of was a quotation of the definition of obscene material as set forth in §26-2101. There is no merit in this complaint.

4. Error is charged on the Court's denial of Ballew's motion to suppress the motion picture film because the search warrants were issued upon affidavits allegedly insufficient to supply probable cause. This same contention was made in *Dyke v. Georgia*, 232 Ga. 817, 823, 824, supra. The affidavits upon which the two search warrants were issued herein contain rather accurate and full factual descriptions of representative scenes on the film, and were sufficient to show probable cause for issuance of the warrants.

5. Ballew contends his conviction on two counts in the accusation were but a single transaction and his conviction thereon violated his constitutional rights against double jeopardy as guaranteed by the Fifth Amendment and the Georgia Constitution. Interestingly, this same argument was made in *Dyke v. Georgia*, 232 Ga. 817, 827, supra, counsel for Ballew having been counsel for Dyke.

Here, the accused was first arrested for showing the film on November 9, and the film was seized under the search warrant. The accused waived commitment hearing. Subsequently, the accused was arrested on another warrant for showing the same picture, from another copy of the film, on November 26. The statement of Mr. Justice Ingram in the *Dyke* case (232 Ga. at pages 827, 828) is equally applicable here. "Appellant argues that the accusation charged him in

two counts of violating the same statute and that the proof involved a regularly scheduled showing of a motion picture in a theatre with no disruption in scheduling. The exhibition of the film on two separate dates, appellant argues, does not permit the state to 'pyramid' the charges and punishment against him . . . but that is not the case here. There were two distinct episodes involving different dates of exhibition and even different copies of the same film. This record shows two criminal violations, not a single crime." So it is in this case.

6. Lastly, appellant complains that he was denied his right to jury trial under the Sixth and Fourteenth Amendments by being tried before a five-person jury in the Criminal Court of Fulton County.

This contention was ruled upon in *Sanders v. State*, 234 Ga. 586 (216 SE.2d 838) (cert. denied by U.S. Supreme Court Feb. 23, 1976) wherein the Supreme Court said: "We reject this argument in view of Georgia authority to the contrary. See *McIntyre v. State*, 190 Ga. 872 (5) (11 SE.2d5). The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a 'jury.' In *Williams v. Florida*, 399 U.S. 78, 92 (Fn. 28) it is observed: 'We have no occasion in this case to determine what minimum number can still constitute a "jury," but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts."

We find no error and affirm the trial court. Deen, P.J., and Quillian, J., concur.

GEORGIA COURT OF APPEALS
DENIAL OF REHEARING

GEORGIA COURT OF APPEALS

May 6, 1976

51795. BALLEW (C.D.) V. THE STATE W-33

Please substitute the attached new page 7 for that previously furnished in the opinion rendered in the above case on April 6, 1976. The judgement is not affected and the motion for rehearing is denied.

GEORGIA SUPREME COURT
DENIAL OF WRIT OF CERTIORARI

CLERKS' OFFICE, SUPREME COURT OF GEORGIA

Atlanta July 9, 1976

Dear Sir;

Case No. 31362 *Claude Davis Ballew v. The State*

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS,
Clerk

GEORGIA CONSTITUTION,
ARTICLE VI, SECTION XVI

Article VI, Section XVI of the Georgia Constitution (*Georgia Code Annotated* §2-5101) provides:

"The right of trial by jury except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior court."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-761

CLAUDE D. BALLEW,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

LEONARD W. RHODES
Room 53 Civil-Criminal Court Building
160 Pryor Street
Atlanta, Georgia 30303
Counsel for Respondent

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CLAUDE D. BALLEW,

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PART ONE

Respondent urges that the Petition For Writ of Certiorari be denied, for the reasons herein given.

OPINION BELOW

The decision sought to be reviewed by this court is reported at 138 Ga. App. 530 (227 S.E. 2d 65), and a copy thereof is attached to the Petitioner's Petition as Appendix "A."

JURISDICTION

The jurisdiction of the court is conceded.

QUESTIONS PRESENTED

1. Whether a jury of five persons is constitutionally adequate under the provisions of the Sixth and Fourteenth Amendments of the Constitution of the United States.

2. Whether jury instructions on scienter that required the State to prove beyond a reasonable doubt that the accused had knowledge, either actual or constructive, and that constructive knowledge consists of knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material, are sufficient to meet constitutional minimum standards.

3. Whether the motion picture film "Behind the Green Door" is obscene and is therefore not protected expression under the First and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

On November 9, 1973, two Investigators for the Office of the Solicitor General for the Criminal Court of Fulton County went to the Paris Art Theatre located in Fulton County, Georgia. Both Investigators were experienced in the criminal prosecution of obscene materials. After paying a consideration they entered the theatre and viewed a motion picture film entitled "Behind the Green Door." The film was advertised on the marquee. After viewing the film, the Investigators obtained a search warrant. The warrant was served on the 9th day of November and the film was seized as evidence after it had been viewed again to make sure it was the same film.

The appellant and a Mr. Pace, who is not a party

here, were present at the theatre both at the time of the first viewing and at the time of the execution of the search warrant. The Investigators bought a ticket from Mr. Pace and the appellant, standing with Mr. Pace behind the cash register, pushed the button to unlock the door into the theatre proper. At the time the warrant was served, Mr. Pace was at the cash register and appellant was in the projection room. Both parties were arrested and appellant checked the cash register and locked the door to the theatre. A commitment hearing was waived as to this arrest on November 26, 1973.

On November 26, 1973, after the waiver of the commitment hearing, the same Investigators went by the Paris Adult Theatre to see if the same film was playing. "Behind the Green Door" was still on the marquee and the film was still showing. The film showing on November 26th was identical to the film shown on November 9th.

The Investigators then entered the theatre to view the film and the appellant and Mr. Pace were again present. When the Investigators tried to buy a ticket from Mr. Pace, he asked appellant to take the money. Appellant told Mr. Pace to accept because "You're the cashier." But Mr. Pace protested and stated "But you're the manager," or "You run the place." The appellant finally took the money. After viewing the film the Investigators obtained another search warrant, and this search warrant was executed on November 27th and again the appellant and Mr. Pace were present. Both appellant and Mr. Pace were arrested for the second time and appellant again locked the theatre. A two count accusation was filed alleging a violation of Ga. Code Ann. 26-2101 on two specified dates, the dates being essential averments to the transactions.

Trial was begun on May 22, 1975 and the jury returned a verdict of guilty. A motion for new trial was filed, and after being heard was overruled on September 29, 1975. Thereafter, the conviction was affirmed by the Court of Appeals of Georgia and the Supreme Court of Georgia denied certiorari.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

THE INSTANT CASE DOES NOT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT, NOR DECIDE SUBSTANTIAL FEDERAL QUESTIONS OF NATIONWIDE IMPORT.

1. A Jury of Five Persons is Constitutionally Adequate Under the Sixth and Fourteenth Amendments of the Constitution of the United States.

Petitioner was tried by a jury of five persons. Under the statute creating the Criminal Court of Fulton County, juries are composed of five persons stricken from a panel of twelve and the defendant is entitled to four preemptory strikes and the State three. The defendant gets first and last preemptory strikes. Ga. Laws 1890-1891, p. 935, as amended. The court was created in 1891 and why the number of jurors was fixed at five is not known. The Criminal Court of Fulton County is a court of limited jurisdiction and may only try misdemeanors, Ga. Laws 1890-1891, p. 935, as amended. It is the only Georgia court of misdemeanor jurisdiction with a five man jury. Jury verdicts in the Criminal Court of Fulton County must be unanimous as they must be in all Georgia Courts. *Ball v. Ga.*, 9 Ga. App. 162, 20 S.E. 888 (1911).

The five man jury has been upheld in Georgia. *McIntyre v. Ga.*, 190 Ga. 872, 11 S.E. 624 (1940), *Willis v. Ga.*, 122 Ga. App. 776 (1970).

The five man jury comports with this Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970). In that case, this Court held a six man jury was constitutionally adequate in State trials under the Sixth and Fourteenth Amendments. This Court said:

> "The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' *Duncan v. Louisiana*, supra, 391 U.S., at 156, 88 S. Ct. at 1451. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained.* And, certainly the reliability of the jury as a fact-finder hardly seems likely to be a function of its size.

It might be suggested that the 12-man jury gives

a defendant a greater advantage since he has more 'chances' of finding a juror who will insist on acquittal and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal." (Emphasis supplied) *Williams v. Florida*, 399 U.S. 78, 103, 104 (1970).

In the instant case, the defendant was entitled to a unaminous verdict and an extra preemptory strike.

It is clear from the *Williams* case that mere size is not the controlling factor in the Sixth Amendment right to a jury trial. One important factor is the insulation provided by a lay body standing between the government and the defendant. *See Baldwin v. New York*, 399 U.S. 66 (1970); *Torres v. Delgado*, 391 F. Supp. 379 (D.C.P.R. 1974), affirmed 510 F.2d 1182 (1st Cir. 1975).

The Petitioner has not complained that an arbitrary exclusion of a particular class has taken place. *Williams v. Florida*, 399 U.S. 78 (1970).

Petitioner argues that a lesser number than 12 or six denies a cross section—however, this Court said in *Williams:*

> ". . . the concern that the cross section will be diminished if the jury is decreased in size from 12 to six seems an unrealistic one." *Williams v. Florida*, 399 U.S. 104 (1970).
>
> As one commentator has said (speaking of civil cases),
>
> "Because the members of the five man jury represent a cross section unit of the community, they will continue to bring into the courtroom the diversity of viewpoint, the objectivity of detachment, the non-professional sense of values, and the spirit

> of justice and fairness unhampered by precedent, which are the foundations of the jury system as we respect it. Moreover, all of the historic values placed upon the jury as a 'casual tribunal' attach readily to the five-member jury as it actually functions in the jury box; human virtues—and shortcomings—are fully present whether there are twelve or five jurors." THE FIVE-MAN CIVIL JURY 51 Geo. L.R. 120, 137 (1962).

This court has not decided what the minimal number of jurors may be under the Sixth Amendment; however, in *Williams* this Court hinted in a footnote that six is above the minimum:

> "We have no occasion in this case (*Williams*) to determine what minimum number can still constitute 'a jury,' *but we do not doubt that six is above that minimum*" (Emphasis supplied), *Williams v. Florida*, 399 U.S. 78, 92 N. 28.

In *Johnson v. Louisiana*, 406 U.S. 356 (1971) this Court went further and considered the jury system of Louisiana.

> "Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12 were required for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. *Williams v. Florida*, 399 U.S. 78 (1970).
>
> . . . As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana

> Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense." *Johnson v. Louisiana*, 406 U.S. 356, 364, 365 (1971).

It is clear that Sixth Amendment requires a jury trial in any case other than a "petty offense," *Baldwin v. New York*, 399 U.S. 66 (1970), but it is also clear that the number of jurors is constitutionally irrelevant as long as it is enough to carry out the jury's historical function and five jurors is adequate for that purpose.

2. Jury Instructions on Scienter That Required the State to Prove Beyond a Reasonable Doubt That the Accused Had Knowledge, Either Actual or Constructive, and That Constructive Knowledge is Knowledge of Facts Which Would Put a Reasonable Man on Notice as to the Suspect Nature of the Material, Are Sufficient to Meet Constitutional Minimum Standards.

Section 26-2101 of the Criminal Code of Georgia provides, in part, as follows:

> "(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowingly,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. . . ."

The Georgia statute, 26-2101 supra, is very similar and compares to New York statutes dealt with by the Court in *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

The Mishkin case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter," and it defined the required mental element in these terms:

> "a reading of the statute (§ 1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . ."

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware."

The statute dealt with in *Ginsberg* defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither *Mishkin* nor *Ginsberg* requires actual knowledge as contended by the Petitioner herein. Both cases were reviewed and followed in *Hamling v. United States*, 418 U.S. 87 (1974), where the Court construed 18 U.S.C. § 1461, and held:

> "To require proof of a defendant's knowedge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. § 1461 nor

by the Constitution."

In the instant case, the Petitioner was arrested on two separate occasions for showing the same motion picture film. Suffice it to say that he had actual notice and knowledge of the nature of the film without any doubt on the second occasion, and therefore the charge given the jury on constructive knowledge, even if error, was harmless to the Petitioner.

3. The Motion Picture Film "Behind the Green Door" is Obscene and is Therefore Not Protected Expression Under the First and Fourteenth Amendments of the United States Constitution.

The trial jury, after receiving proper charges as to the law involved, applied the law and returned its verdict finding the motion picture film "Behind the Green Door" obscene.

In its opinion on review of this case, the Court of Appeals of Georgia wrote:

> "Our duty to uphold the constitutional guarantees is no less than that of the justices of the respective Supreme Courts of the United States and of this State, and although we abhor even the suggestion of censorship we nevertheless viewed an exhibition of this film in its entirety. . . .
>
> The film, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest. It is without redeeming social value, and it is a shameful and morbid exhibition of nudity with particular and all-encompassing emphasis on sexual acts. It goes substantially beyond customary limits of candor in representing and portraying nudity and sex. The film presents patently offensive exhibitions and representations of ultimate sexual acts and manipulations, normal and perverted. It shows unabashedly offensive and lewd views of the genitals of both male and female participants, and is replete with portrayals of individual and group acts of masturbation, cunnilingus, fellatio and sexual intercourse. It is degrading to sex. Except for the opening and a few other scenes toward the conclusion, it is rank, hard core pornography, and each exhibition in the theatre was 'a public portrayal of hard core sexual conduct for its own sake, and (presumably) for the ensuing commercial gain.' *Miller v. California*, 413 U.S. 15, 35, supra. The film 'Behind the Green Door' is obscene as a matter of constitutional law and fact, and is unprotected by the First and Fourteenth Amendments". . . . *Ballew v. The State*, 138 Ga. App. 530.

Petitioner cites a long line of cases in support of his contention that this Court should make an independent review and determination of obscenity vel non. It appears to be his contention that this Court should make an independent review and determination of obscenity vel non on all materials brought into question in the State Courts. With the exception of *Jenkins v. Georgia*, 418 U.S. 153 (1974), all the cases cited by the Petitioner were decided during the period between *Roth v. United States*, 354 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 15 (1973); a period when no majority of the Court could agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power, and at which time convictions were reversed by this Court summarily.

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine

what constitutes obscene, pornographic material subject to regulation under the States' police power. *See*, e.g., *Redrup v. New York*, 386 U.S. at 770-771, 87 S. Ct. at 1415-1416. We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' *Interstate Circuit, Inc. v. Dallas*, 390 U.S., at 704-705, 88 S. Ct. at 1314 (Harlan, J., concurring and dissenting)." . . . *Miller v. California*, 413 U.S. 15, 22, 88 S. Ct. 2607, 2614.

"In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L. Ed. 2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy.' *See Walker v. Ohio*, 398 U.S. 434-435, 90 S. Ct. 1884, 26 L. Ed. 2d 385 (1970) (dissenting opinions of Burger, C. J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." *Miller v. California*, 413 U.S. 15, 88 S. Ct. 2607, 2614 (Footnote 3).

In *Jenkins v. Georgia*, supra, the film "Carnal Knowledge" was in question and the scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. Such is not the case in the film "Behind the Green Door" where, not only does the camera focus on the bodies of the "actors" while engaged in "ultimate sexual acts," but it shows offensive and lewd views of the genitals of both

male and female participants. See the opinion of the Court of Appeals of Georgia, Petitioner's Petition, Appendix "A," at page A. 4.

The motion picture film "Behind the Green Door" is hard-core pornography at its worst and its showing by the Petitioner on both occasions for which he was convicted was "calculated purveyance of filth."

CONCLUSION

For all the foregoing reasons, Respondent urges this Court to decline to issue the Writ of Certiorari in this case.

Respectfully submitted,

LEONARD W. RHODES
Assistant Solicitor
Criminal Court of Fulton County
Counsel for Respondent

53 Civil-Criminal Court Building
160 Pryor Street, S.W.
Atlanta, Georgia 30303
(404) 572-2911

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Mail three (3) copies of the foregoing Brief of Respondent in Opposition to the Petition for Writ of Certiorari with first class postage prepaid, addressed to Robert Eugene Smith, Esquire, 1409 Peachtree Street, N.E., Atlanta, Georgia 30309, Attorney for Petitioner.

This _____ day of _____, 197__.

LEONARD W. RHODES
Counsel for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-761

CLAUDE D. BALLEW,
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v.

STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

BRIEF OF PETITIONER

Of Counsel:
MICHAEL CLUTTER, Esq.
1409 Peachtree St., N.E.
Atlanta, Georgia 30309

ROBERT EUGENE SMITH, Esq.
1409 Peachtree St., N.E.
Atlanta, Georgia 30309
Attorney for Petitioner

The Paul M. Harrod Company, Baltimore, Maryland 21234

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OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 138 Ga. App. 530, 227 S.E.2d 65. It is also set forth in Appendix A to the Petition for Writ of Certiorari as well as at pages 19 through 25 of the Joint Appendix.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on April 6, 1976. An application for rehearing was timely filed and denied on May 6, 1976. The Georgia Supreme Court denied a timely filed petition for writ of certiorari on July 9, 1976. Mr. Justice Powell granted an extension of time to and including December 6, 1976 within which to file a petition for writ of certiorari. The petition was filed on December 3, 1976, and it was granted on January 25, 1977. The jurisdiction of this Court is invoked under Title 28, United States Code §1257 (3).

QUESTIONS PRESENTED

1. Whether a jury composed of five persons is sufficient to afford an accused in a criminal prosecution to the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether a standard of *scienter* which authorizes obscenity convictions on mere "constructive" knowledge impermissibly chills the dissemination of expression protected under the First and Fourteenth Amendments to the United States Constitution.

3. Whether the motion picture film "Behind the Green Door" is, as a matter of applicable constitutional law, protected expression under the First and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Sixth and Fourteenth Amendments to the United States Constitution as well as Article VI, Section XVI, of the Georgia Constitution are set forth in Appendix D to the Petition for Writ of Certiorari. Article VI, Section XVI, of the Georgia Constitution is also set forth at page 27 of the Joint Appendix.

STATEMENT

Petitioner was convicted in the Criminal Court of Fulton County for distributing obscene material, the charges being predicated upon exhibition of the motion picture film "Behind the Green Door" at an Atlanta theatre where petitioner was employed. He was tried, over objection, before a five-person jury and convicted. He was sentenced to a one-year term of imprisonment and a fine of $2,000.00. He thereafter appealed his conviction to the Georgia Court of Appeals which affirmed the trial court judgment in all respects in a judgment and opinion for which review is sought here.

ARGUMENT

I.

A JURY COMPOSED OF FIVE PERSONS IS INSUFFICIENT TO AFFORD AN ACCUSED IN A CRIMINAL PROSECUTION THE RIGHT TO TRIAL BY JURY GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In *Williams v. Florida*, 399 U.S. 78 (1970), this Court held that the Sixth Amendment guarantee of trial by jury in criminal cases, made applicable to the states through the Fourteenth Amendment, does not require trials before twelve-person panels. While approving six-person juries, the Court in *Williams* left open the question of what minimum number of jurors is required to guarantee the constitutional right to jury trial in state criminal cases. 399 U.S., at 91 n.28. That is the first question before this Court in the instant case.

The decision in *Williams, supra,* was predicated upon an analysis of the purpose of jury trials and a finding that the purpose was not frustrated by a reduction in the size of the jury from twelve to six persons. Petitioner suggests that the question now before the Court should be answered on the same basis of analyzing the purposes of jury trials and determining whether those purposes can be adequately fulfilled by five-person panels. It is respectfully submitted that, especially in obscenity cases involving a determination of local community standards, no jury of five or fewer persons can adequately carry out the purposes of the jury trial as a guaranteed constitutional right.

It must first be noted that there is an important distinction between trials for robbery such as that in *Williams, supra,* and trials for obscenity offenses such as the instant case. This distinction was noted by Petitioner at an early stage when he moved to impanel a twelve-person jury. In arguing the motion, counsel for Petitioner stated:

> "The Solicitor has chosen to proceed in this Court which only allows five-person juries to try a case. And we think, given the fact that in obscenity cases the issue of contemporary community standards and a cross-section of the community must be properly applied in order to afford defendant a fair trial, given a cross-section of the community, a twelve-man jury would be more proper.
>
> "I know the United States Supreme Court has allowed a minimum, the bottom of six-person juries. I think that the five-man jury in and of itself is subject to attack. But in light of these circumstances, I think that a five-man jury is even less proper because of the subjective evaluation and standards, and adequate cross-section.
>
> "We don't have, did a man pull a trigger. Did a man shoplift. But we have to apply this contemporary community standards regarding sex, nudity, excretion, etc." Tr., at 14.

In light of the unique task confronting a jury in any obscenity case, any decrease in the number of jurors performing that task effects not only determinations of guilt or innocence, but also implicit enunciations of contemporary community standards.

In *Miller v. California*, 413 U.S. 15 (1973), this Court eliminated the requirement of national standards and the determination of obscenity to be determined against the background of local community standards as viewed by the average person. The purpose of this standard was stated by the Court to be that:

> "So far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person – or indeed a totally insensitive one." 413 U.S., at 33.

The necessity of obtaining an adequate cross section of the community is thus heightened in obscenity cases in order to obtain a more reliable reflection of the views of the "average person" in the community rather than particularly susceptible or totally insensitive citizens.

The determination of local community standards as viewed by the average person is, by definition, an averaging process. In this regard, juries may be viewed, in a statistical sense, as a sample group from which one is to judge the average views of the community at large. It is axiomatic that the ability of this sample group to accurately reflect the total population is directly proportional to the size of the sample. With each decrease in size, there is an increase in the likelihood of judging any material by a small group containing, by chance, highly susceptible and/or totally insensitive persons. The smaller the group, the larger the voice of such minority viewpoints.

The quality of jury decisions in obscenity cases as truly representative of the views of the community as a whole will be increased as the number of jurors making the decision is increased. It has thus been noted that:

> "The greater representativeness of the larger groups results from the obvious fact than an individual with a given characteristic is more likely to appear in a random collection of twelve individuals than any random collection of six. Thus, the presence of jurors with viewpoints, abilities, quirks, or racial identities that characterize only a minority of the population is more likely with larger juries." Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L. Rev. 643, 668 (1975).

Since it is axiomatic that larger randomly selected groups tend toward greater heterogeneity of membership, a six-person jury is better able than a five-person jury to accurately reflect the views of a heterogeneous community. The difference between five-person deliberations and six-person deliberations might seem small in the abstract. Viewed alternatively, however, increasing a jury from five to six persons increases the input in community standard determination by a full twenty percent. This is significant whenever sensitive First Amendment values are implicated. It is even more important since the *Williams* decision already reduced the constitutional minimum from twelve to six and each additional reduction brings us even further down the "slippery slope toward dispensing with the jury altogether" which was recognized in *Williams*. 399 U.S., at 91 n.28.

Quite apart from the unique First Amendment implications present in the instant case, it is submitted that

five-person juries are constitutionally inadequate to guarantee the right to trial by jury even as it relates solely to the determination of guilt or innocence in any criminal case. In approving the decrease from twelve to six-member juries in *Williams*, the Court noted its inability to find any "discernible difference between the results reached by the two different sized juries." 399 U.S., at 101. The theoretical advantage of larger juries in presenting a defendant with greater chances of finding a holdout for acquittal was dismissed by noting that larger juries also present the state with more chances of finding a holdout for guilt. *Id.*

While empirical data is limited, that which exists tends to repudiate the Court's unsupported assumption that any increase in holdouts associated with larger juries inures equally to the benefit of the state and the defendant. The only data available to Petitioner's counsel indicates that approximately twenty-five percent of all hung juries are caused by a single juror holding out for acquittal and almost no hung jury can be singled out as predicated upon one juror holding out for conviction. See, H. Kalven and H. Zeisel *The American Jury* (Little, Brown & Co., 1966). This evidence would appear to support the proposition that a decrease from six to five person juries will increase the number of guilty verdicts because of the decreased chance of the presence of a holdout for acquittal.

The Petitioner, however, does not merely rely upon empirical data supporting the proposition that larger juries inure to the benefit of defendants. What is more pervasive, and more in portant, is data supporting the proposition that the quality of group decisions is higher in larger than in smaller groups, regardless of whether that increase in quality

benefits the defendant or the state. The obvious advantage of larger group decision making over the small group decision making derives from the greater input of diverse viewpoints, the increase in individual contributions to the decision making process, and the greater heterogeneity of the decision making body.

The positive effect upon the quality of decision making achieved by increasing group size has been extensively studied. The advantages of larger groups stated above have been substantiated in over thirty studies in which the quality of the decision making was correlated to group size. These studies are summarized in Thomas and Fink, *Effects of Group Size*, 60 Psych. Bull. 371 (1963). The authors there conclude that:

> "It appears that both quality of group performance and group productivity were positively correlated with group size under some conditions, and under no conditions were smaller groups superior." *Id.*, at 373.

The studies supporting this conclusion are set forth in Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L.Rev. 643, 685 n.118. By refusing to take the further step down the "slippery slope" from six to five-person juries, the Court thus has an opportunity to promote the community interest in correct verdicts, quite apart from the defendant's interest in verdicts of acquittal. See, Lempert, *supra*, at 684.

The difference in the quality of the decision making and the difference in the outcomes produced when juries are decreased in size is especially important in light of the

premise underlying the *Williams* decision. The Court in *Williams*, unable to find significant historical guidance, proceeded solely upon an aanalysis of the purpose of jury trials:

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." 391 U.S., at 156.

The Court authorized the decrease from twelve persons to six persons in *Williams* upon the supposition that no discernible change in outcome would result. All of the studies since that time have indicated not only that differences in outcome result but also that the quality of decision making is decreased.

A further purpose of the jury in our constitutional scheme was expounded upon by this Court in *Williams* as follows:

> "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." 399 U.S., at 99.

The Court in *Williams*, although failing to reach the issue of the required minimum did enunciate the principles to be applied in that determination:

> "[T]he number should probably be large enough to promote group deliberation, free from outside

> attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." *Id.*

When judged against these criteria, the five-person jury provided by the Georgia statute here under review must be found wanting.

If the purpose of a jury is to interpose the conscious of the community between the prosecutor and a compliant judge, a broad cross-section must be afforded in order to assure that the compliant judge is not merely replaced by a single compliant juror with the ability to determine guilt or innocence and the further ability to enunciate highly sensitive or totally insensitive personal values as the relevant local community standards in a sensitive First Amendment area.

II.

A STANDARD OF SCIENTER WHICH AUTHORIZES OBSCENITY CONVICTIONS ON MERE "CONSTRUCTIVE" KNOWLEDGE IMPERMISSIBLY CHILLS THE DISSEMINATION OF EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its charge to the jury, the trial court gave the following instruction on the issue of *scienter*:

> "[T]he word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge

> of the obscene content if he has the knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." App. 10.

Petitioner objects to the above instruction to the extent that it authorizes a conviction predicated on mere "constructive" rather than actual knowledge.

The most recent pronouncement of this Court on the requirements of *scienter* is found in *Hamling v. United States*, 418 U.S. 87 (1974). There, this Court stated:

> "We think the 'knowingly' language of 18 U.S.C. §1461 and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter*. It is constitutionally sufficient that the prosecution show that the defendant *had* knowledge of the contents of material he distributes, and that he knew the character and nature of the materials." 418 U.S., at 123 (emphasis added).

Consistent with the above statement from *Hamling*, Petitioner contends that the prosecution must show that he "had" knowledge rather than that he "should have had" knowledge of the content, character and nature of the materials distributed.

There is virtually no evidence at all in the record that Petitioner had any knowledge, constructive or otherwise, of the nature, character or contents of the film with which he is charged. The only evidence at all relating to this issue is a statement by another employee that Petitioner is the manager of the theatre. There was no evidence whatever

that he had personally viewed the film, nor was there any evidence at all as to the general fare in the theatre.

Petitioner complains of the chilling effect upon the distribution of non-obscene but sexually oriented matter that a constructive knowledge standard of *scienter* must necessarily produce. It was precisely such a chilling effect which concerned this Court in its examination of the Los Angeles obscenity ordinance which completely dispensed with the *scienter* requirement. *Smith v. California*, 361 U.S. 147 (1959). As in *Smith*, Petitioner here complains of the self-censorship produced by the lowered *scienter* standard which will impose "a restriction upon the distribution of constitutionally protected as well as obscene literature." 361 U.S., at 153.

In dealing with the absolute liability obscenity ordinance in *Smith*, the Court noted that booksellers facing absolute criminal liability, without the necessity of proving any knowledge, would tend to restrict the books they sell to those which they have personally inspected. The Court further noted that the effect of such a law impinges upon the First Amendment rights of the public to have access to reading material as well as to the First Amendment rights of the distributor to make material available. In this regard the Court noted:

> "The bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of book shops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed." 361 U.S., at 153.

It must be conceded that the constructive knowledge prong of the Georgia *scienter* requirement now before the Court does not produce as pronounced a chilling effect as that which flowed from the absolute liability obscenity ordinance in *Smith*. But, though the impermissible chilling effect is not as great in the case at bar, it is nonetheless present. It is true that booksellers and movie purveyors facing the Georgia *scienter* requirement need not personally inspect all of the materials they purvey. The must, however, personally inspect a great percentage thereof at the risk that a jury might later conclude that the title to a book or movie or the cover of a magazine should have put them on notice and necessitated an inspection of the entire film or publication.

The covers of nearly every issue of *Playboy*, *Gallery*, *Penthouse*, *Oui*, *Playgirl*, *Hustler* and several other similar magazines are sexually oriented in some degree. A jury might well conclude that such covers, or even the general public's knowledge of the contents of such magazines, would put a reasonable and prudent bookseller on notice and thus charge him with constructive knowledge of the contents of each and every issue. The cautious bookseller, fearing such a conclusion by a jury, will remove all such publications from his stands until he has an opportunity to personally peruse them in their entirety. Such self-censorship would, as the Court described in *Smith*, *supra*, tend to "restrict the public's access to forms of the printed word which the state could not constitutionally suppress directly." 361 U.S., at 154.

The same self-censorship would ensue with respect to any book or non-pictorial magazine which has any allusion

to sex or nudity in its title or on its cover. The best selling novel "Kinflicks" by Lisa Alther is hardly sexual but a cautious bookseller might note the fact that the title is an obvious word play from the slang terminology for pornographic films – skinflicks. A cautious bookseller would take it from his shelves until he read it since it is clear that the printed word alone is capable of characterization as obscene. *Kaplan v. California*, 413 U.S. 115 (1973). Due to the necessarily longer time required for complete review of books, the public's access to textual material would be even more restricted than its access to pictorial magazines.

With respect to films, this Court might recall its own exposure to the motion picture film "Carnal Knowledge" in *Jenkins v. Georgia*, 418 U.S. 153 (1974). After a viewing of the film by the Court, the judgment of conviction was unanimously reversed. The opinion of the Court stated that the motion picture film could not, as a matter of constitutional law, be found obscene. Despite the somewhat enticing title, the Court's opinion displays the extremely tame content of the film as follows:

> "While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including 'ultimate sexual acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards." 418 U.S., at 161.

Despite its rather mild content, the title of the film would be sufficient to chill any exhibitor who might fear a jury determination that the title gave him "constructive" knowledge of the contents. Thus, despite the film's national critical acclaim which included an academy award nomination, the cautious exhibitor would refrain from booking the film and thus making it available in his area until he had a chance to personally peruse it in its entirety.

The hypotheticals set forth above amply demonstrate the impermissible chilling effect produced by the constructive knowledge instruction. Through it, every purveyor of presumptively protected First Amendment material is at the mercy of an unpredictable jury determination that some facet of the title or cover or label on the material he distributes gave him reason to refrain from distributing such material until he could complete a review of it. By such a scheme, the self-censorship condemned in *Smith, supra,* surfaces once again:

> "The bookseller's self-censorship, compelled by the state, would be a censorship effecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." 361 U.S., at 154.

The Respondent herein will surely claim, as did the respondent in *Smith,* that the elimination of this lower *scienter* requirement will interfere with the legal regulation of obscene material because "booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity." 361 U.S., at 154. But what the Court said in *Smith,* is equally applicable here. The Court

there noted that the law is not impotent to explore the actual state of a man's mind. It was further noted that the state need not prove that a bookseller actually perused the material with which he is charged. Rather, it was held that "the circumstances may warrant the inference that he was aware of what a book contained, despite his denial." *Id.*

Thus, Petitioner does not contend that State may not prove his knowledge by circumstantial evidence. Rather, he merely contends that the knowledge proved, whether by circumstantial evidence or otherwise, must be actual rather than "constructive" knowledge. A properly instructed jury might well find that Petitioner "knew" the content of the film he exhibited whether or not he actually looked at it. Knowledge in this sense may be defined as a correct belief. It is with just this sort of knowledge that attorneys "know" that the new volume of United States Reports which just arrived in the mail contains opinions of the United States Supreme Court. They may be said to know this even before they personally inspect the volume.

Petitioner does not contend that he can escape criminal liability by refusing to review the material he distributes. If such were the case, some might refuse to review the material precisely because they "know" what they will find. In a very real sense, such individuals might be held to actually know the content of the material despite the lack of a personal perusal. Petitioner thus concedes that a properly instructed jury might find that he had actual knowledge of the contents of the film whether or not he personally viewed it.

What Petitioner does contend is that he cannot be convicted in the absence of proof of what he actually knew, whether this actual knowledge is proved by circumstantial evidence or otherwise. Georgia's *scienter* standard encompassing constructive knowledge goes beyond this by imposing a duty to make inquiry whenever a jury decides that a reasonable and prudent person would have done so. The requirement of such an inquiry, at the risk of criminal liability, would seriously inhibit the distribution of non-obscene material which has some allusion, however vague or insubstantial, to sex or nudity in its title or cover. This is precisely the impermissible chilling effect condemned in *Smith, supra,* and the constructive knowledge standard must thus be found constitutionally infirm.

III.

THE MOTION PICTURE FILM "BEHIND THE GREEN DOOR" IS AN ARTISTIC WORK OF NATIONAL ACCLAIM WHICH MAY NOT AS A MATTER OF APPLICABLE CONSTITUTIONAL LAW, BE HELD OBSCENE SINCE IT IS PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court is respectfully requested to independently review the alleged obscenity of the motion picture film upon which Petitioner's conviction is predicated in furtherance of the doctrine of independent appellate review which had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478 (1962).

The doctrine was again invoked by the Court in *Jacobellis v. Ohio,* 378 U.S. 184 (1964) and more recently in *Jenkins v. Georgia,* 418 U.S. 153 (1974). *Jenkins* involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

The Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity *vel non* of the nationally acclaimed motion picture film "Behind the Green Door" upon which Petitioner's conviction rests.

In any independent review, the past findings of this Court on the sole issue of obscenity have obvious bearing. In this respect it is important to note that findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicit depictions or descriptions of sexual activities, including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sadomasochism, and homosexual activity. *See, e.g., Memoirs v. Massachusetts,* 383 U.S. 413 (1966) ("Fanny Hill"); *Aday v. United States,* 388 U.S. 447 (1967) ("Sex Life of a Cop" described at 357 F.2d 855); *Corinth Publications v. Westberry,* 388 U.S. 448 (1967) ("Sin Whisper" described at 146 S.E.2d 764); *Mazes v. Ohio,* 388 U.S. 453 (1967) ("Orgy Club"); *Hoyt v. Minnesota,* 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other

books); *Grove Press v. Gerstein*, 378 U.S. 577 (1964) ("Tropic of Cancer").

In the area of motion picture films, this Court has reversed findings of obscenity as to films which depict totally nude women; films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing pubic and rectal areas; and films depicting lesbian sexual activity and hetero-sexual activity between men and women. Moreover, this Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity as to a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess*, 429 F.2d 416 (CA 9 1970), *affirmed sub nom. Pinkus v. California*, 400 U.S. 922 (1970).

In its determination of this particular issue upon which the Court has granted certiorari, Petitioner would respectfully urge the Court to review the developments flowing from the landmark decisions in *Miller v. California*, 413 U.S. 15 (1973), and its companion cases. Petitioner would further respectfully urge the Court to reconsider those decisions in light of consequences which they have precipitated.

If the reformulation of obscenity standards in *Miller* was intended, at least in part, to simply the issues and alleviate judicial involvement in such determinations, the history since *Miller* has clearly shown the contrary to be the case. Only one year after the pronouncement, the Court found itself once again mired in what Mr. Justice Harlan

referred to as "the intractable obscenity problem." *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) (Harlan, J., concurring and dissenting). Many members of the Court can well recall that, in order to determine the issue presented in *Jenkins*, the Court was required to screen the film "Carnal Knowledge" and make an independent determination of its alleged obscenity. This development has given credence to Mr. Justice Brennan's prediction that, even under the *Miller* test:

> "One cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards have pronounced it so." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting).

The impact of these landmark decisions upon the judiciary was once again brought to the Court's attention in *Marks v. United States*, U.S. (No. 75–708, decided March 1, 1977). In *Marks*, the Court had before it the question of whether the doctrine of independent appellate review necessitates an actual viewing of materials found obscene at the trial level. The Solicitor General, confessing error, conceded that such an actual review is necessary at least at the initial appellate stage. While the Court found it unnecessary to expressly address this issue, it did refer to the Court of Appeals' characterization of the materials, made without an actual viewing, as "of dubious value." U.S. , n.11.

Even the requirement of a single level of actual review, especially in cases involving motion picture films and full length books, places an incredible strain upon the rare resources of judicial time and energy. Because of the

widespread concern over our presently overworked judiciary, Petitioner respectfully urges the Court to re-examine the earlier decisions in light of the substantial stress thereby placed upon an already overworked judicial structure. As Mr. Justice Brennan stated in *Jenkins, supra*:

> "Because of the attendant uncertainty of such a process [appellate review of allegedly obscene materials] and its inevitable institutional stress upon the judiciary, I continue to adhere to my view [as to the constitutionality of obscenity laws]." 418 U.S., at 165 (Brennan, J., dissenting).

If a reconsideration of its 1973 pronouncements is to be undertaken by the Court, it is important to note the state of the record below. There is no evidence whatever that either Petitioner or the theater which employed him engaged in the distribution of any materials to juveniles or the exposure of any materials to unconsenting adults. To the contrary, they were merely engaged in a business described by Mr. Justice Stevens as "providing another with material which he has a constitutional right to possess. See *Stanley v. Georgia*, 394 U.S. 557." *Marks v. United States*, U.S. (Stevens, J., concurring and dissenting). It is just for this conduct that Petitioner has been sentenced to a year of imprisonment. The Court is respectfully urged to reconsider such consequences are constitutionally permissible or whether, as a matter of law, all "community standards" in this country must contain an element of tolerance reflecting the values of the First Amendment.

If, as the First Amendment indicates, our entire governmental system is predicated upon a preference toward testing ideas in the market place rather than the courtroom,

the necessary presence of this element in all local community standards leads to the inescapable conclusion that Petitioner here cannot stand convicted of a crime. As Mr. Justice Douglas stated in *Paris Adult Theatre I v. Slaton, supra*:

> "Our society – unlike most in the world – presupposes that freedom and liberty are in a frame of reference that makes the individual, not government, the keeper of his tastes, beliefs, and ideas. That is the philosophy of the First Amendment; and it is the article of faith that sets us apart from most nations in the world." 413 U.S., at 73 (Douglas, J. dissenting).

With a view toward alleviating the present institutional strain upon the judiciary and with the further view of reaffirming that "article of faith that sets us apart from most nations in the world," the Court is respectfully urged to consider whether Petitioner may be constitutionally imprisoned for the conduct in which he has engaged. If that possibility is found to exist, the Court is urged to find that the motion picture film, in the circumstances in which it was shown, cannot, as a matter of applicable constitutional law, be held obscene.

CONCLUSION

For all of the above reasons Petitioner's conviction should be reversed.

Respectfully submitted,

ROBERT EUGENE SMITH, Esq.

1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Attorney for Petitioner

Of Counsel:
MICHAEL CLUTTER, Esq.
1409 Peachtreet Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-761

CLAUDE D. BALLEW,
Petitioner,

vs.

STATE OF GEORGIA,
Respondent.

BRIEF OF RESPONDENT

LEONARD W. RHODES
Room 53 State Court Building
160 Pryor Street, S.W.
Atlanta, Georgia 30303
Counsel for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1761

CLAUDE D. BALLEW,
Petitioner,

vs.

STATE OF GEORGIA,
Respondent.

BRIEF OF RESPONDENT

ARGUMENT

I.

A JURY OF FIVE PERSONS IS CONSTITUTIONALLY ADEQUATE FOR THE TRIAL OF MISDEMEANOR CASES WHERE THE MAXIMUM POSSIBLE IMPRISONMENT IS TWELVE MONTHS.

Petitioner was tried in the Criminal Court of Fulton County[1] by a jury of five persons[2] selected from a panel of twelve prospective jurors qualified to serve, with the Petitioner having four peremptory challenges, the State having three peremptory challenges, and with the Petitioner having benefit of the first and last challenge.

[1] The name of the Criminal Court of Fulton County has been changed, effective January 2, 1977, by the merger of the Criminal Court of Fulton County with the Civil Court of Fulton County into a court known as and named the State Court of Fulton County. Georgia Laws 1976 Session, p. 3023.

[2] Effective March 24, 1976, the number of jurors was changed from five to six in the Criminal Court of Fulton County. Georgia Laws 1976 Session, p. 3019.

It was necessary that each individual juror believe, beyond a reasonable doubt, that Petitioner was guilty of the offenses with which he was charged and that all the elements of the crimes were present, including the fact of obscenity. Jury verdicts in Georgia must be unanimous, *Ball v. The State of Georgia*, 3 Ga. App. 162, 20 S.E. 888 (1911), and the jury in this case was so charged (App. 10).

The five-man jury comports with this Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970). In that case, this Court held a six-man jury was constitutionally adequate in State trials under the Sixth and Fourteenth Amendments. This Court said:

> "The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge.' *Duncan v. Louisiana*, supra, 391 U.S., at 156; 88 S. Ct., at 1451. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a fact-finder hardly seems likely to be a function of its size.*
>
> It might be suggested that the 12-man jury gives a defendant a greater advantage since he has more 'chances' of finding a juror who will insist on acquittal and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal." (Emphasis supplied) *Williams v. Florida*, 399 U.S. 78, 103, 104 (1970).

It is clear from *Williams* that mere size is not the controlling factor in the Sixth Amendment right to a jury trial. One important factor is the insulation provided by a law body standing between the government and the defendant. See *Baldwin v. New York*, 399 U.S. 66 (1970); *Torres v. Delgado*, 391 F. Supp. 379 (D.C.P.R. 1974), affirmed 510 F.2d 1182 (1st Cir. 1975).

The Petitioner has not complained that an arbitrary exclusion of a particular class has taken place. *Williams v. Florida*, 399 U.S. 78 (1970).

Petitioner argues that a lesser number than 12 or six denies a cross section—however, this Court said in *Williams:*

> ". . . the concern that the cross section will be diminished if the jury is decreased in size from 12 to six seems an unrealistic one." *Williams v. Florida*, 399 U.S. 104 (1970).
>
> As one commentator has said (speaking of civil cases),
>
> "Because the members of the five-man jury represent a cross section unit of the community, they will continue to bring into the courtroom the diversity of viewpoint, the objectivity of detach-

ment, the non-professional sense of values, and the spirit of justice and fairness unhampered by precedent, which are the foundations of the jury system as we respect it. Moreover, all of the historic values placed upon the jury as a 'casual tribunal' attach readily to the five-member jury as it actually functions in the jury box; human virtues—and shortcomings—are fully present whether there are twelve or five jurors." *THE FIVE-MAN CIVIL JURY*, 51 Geo. L.R. 120, 137 (1962).

This court has not decided what the minimal number of jurors may be; however, in *Williams* the Court stated in a footnote that six is above the minimum:

> "We have no occasion in this case (*Williams*) to determine what minimum number can still constitute 'a jury,' *but we do not doubt that six is above that minimum*" (Emphasis supplied), *Williams v. Florida*, 399 U.S. 78, 92 N. 28.

If six is above the minimum, five cannot be below the minimum. There is no number in between.

In *Johnson v. Louisiana*, 406 U.S. 356 (1971) the Court considered the jury system of Louisiana and wrote:

> "Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes, a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12 were required for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. *Williams v. Florida*, 399 U.S. 78 (1970).

> . . . As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense." *Johnson v. Louisiana*, 406 U.S. 356, 364, 365 (1971).

The Court again in *Colgrove v. Battin*, 413 U.S. 149 (1973) was faced with making a decision on the question of the number of jurors required, this time the question arose under the Seventh Amendment and concerned civil juries. The Court in following *Williams v. Florida*, supra, stated:

> ". . . Keeping in mind the purpose of the jury trial in criminal cases to prevent government oppression, *Williams*, 399 U.S., at 100, 90 S. Ct., at 1905, and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues, *Gasoline Products Co. v. Champlin Co.*, 283 U.S. 494, 498, 51 S. Ct. 513, 514, 75 L. Ed. 1188 (1931), the question comes down to whether jury performance is a function of jury size. In *Williams*, we rejected the notion that 'the reliability of the jury as a factfinder . . . [is] a function of its size,' 399 U.S., at 100-101, 90 S. Ct., at 1906, and nothing has been suggested to lead us to alter that conclusion. Accordingly, we think it cannot be said that 12 members is a substantive aspect of the right of trial by a jury." 413 U.S. 149, 157; 93 S. Ct. 2448, 2453 (1973).

It is clear that the Constitution does not require any specific number of persons to make up a trial jury; and had the framers of the Constitution, and the Amend-

ments thereto, intended that trial juries be composed of not less than twelve persons, or any other number, the minimum number could easily have been written into the Constitution. This was not done, and therefore, it can be assumed that it was intended that the number required be flexible and left to Congress and the legislatures of the various states to make that determination.

In *Williams v. Florida*, supra, a six-person jury was held to be constitutionally adequate in a case involving the felony offense of robbery and where a life sentence was imposed. In this case, the Petitioner was tried by a five-person jury for misdemeanor offenses where the maximum imprisonment could be no more than twelve months for each offense.

It is clear that the Sixth Amendment requires a jury trial in any case other than a "petty offense," *Baldwin v. New York*, 399 U.S. 66 (1970), but it is also clear that the number of jurors is constitutionally irrelevant as long as it is enough to carry out the jury's historical function and five jurors is adequate for that purpose.

II.

JURY INSTRUCTIONS ON SCIENTER THAT REQUIRED THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT THE ACCUSED HAD KNOWLEDGE, EITHER ACTUAL OR CONSTRUCTIVE, AND THAT CONSTRUCTIVE KNOWLEDGE IS KNOWLEDGE OF FACTS WHICH WOULD PUT A REASONABLE AND PRUDENT PERSON ON NOTICE AS TO THE SUSPECT NATURE OF THE MATERIAL, ARE SUFFICIENT TO MEET CONSTITUTIONAL MINIMUM STANDARDS.

Section 26-2101 of the Criminal Code of Georgia provides, in part, as follows:

> "(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowingly,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and *a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. . . .*" (Emphasis added)

The trial court charged the jury on scienter according to the provisions of the Georgia statute, supra, and this charge is in keeping with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when the court held that the person charged with the offense of mailing obscene material must know *or have notice of the contents* of the material.

> "The inquiry, in proceedings under Rev. Stat. §3893, is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail *by one who knew or had notice at the time of its contents*, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." (Emphasis added) *Rosen v. United States*, 161 U.S. 29 (1896).

Rosen did not require the accused to have knowledge of the obscenity of the material, only *notice of its contents.*

". . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. . . ." *Smith v. California*, 361 U.S. 147, 154 (1959).

The Georgia statute, 26-2101 supra, is very similar and compares to New York statutes dealt with by the Court in *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

The *Mishkin* case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter," and it defined the required mental element in these terms:

> "a reading of the statute (§1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . ."

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware."

The statute dealt with in *Ginsberg* defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither *Mishkin* nor *Ginsberg* requires actual knowledge as contended by the Petitioner herein. Both cases were reviewed and followed in *Hamling v. United States*, 418 U.S. 87 (1974), where the Court construed 18 U.S.C. §1461, and held:

> "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. §1461 nor by the Constitution."

In the instant case, the Petitioner was arrested on two separate occasions for showing the same motion picture film. Suffice it to say that he had actual notice and knowledge of the nature of the film without any doubt on the second occasion, and therefore, the charge given the jury on constructive knowledge, even if error, was harmless to the Petitioner.

In the case of *Kuhns v. California*, No. 76-970, this Court recently denied petition for certiorari, 21 CrL 4078, to review jury instructions based upon the California obscenity statute which defines "knowingly" as "[be] aware of the character of the matter. . . ." *California v. Kuhns*, 61 Cal. App. 3d 735, 132 Cal. Rptr.

725, 737 (1976).

Petitioner in this case concedes that proof of scienter may be made by circumstantial evidence (Pet. Br. 17). Respondent contends and respectfully submits that to prove the accused was aware of facts that would put a reasonable and prudent person on notice of the suspect character of the material, is proof of knowledge of the character of the material by circumstantial evidence.

Petitioner contends that the only evidence to show his knowledge of the nature, character or contents of the film was a statement by another employee that the Petitioner is the manager of the theater (Pet. Br. 12). Be it remembered that the Petitioner was twice arrested for the exhibition of the film in question and that on the day before the second arrest, the Petitioner, having recognized the officer, hesitated and reluctantly sold the officer an admission ticket (Tr 29, 30). This evidence shows that the Petitioner was aware that he was engaged in proscribed conduct by exhibiting obscene material, yet he continued that conduct and was again arrested.

There was further evidence that a sign was posted showing that there was being displayed in the theater an "X-rated movie and nudity, etc., if under age please do not enter" (Tr 59). The theater management cannot advertise a fact to give the public notice of the nature of the motion picture film without being aware themselves of the fact so advertised. The Petitioner must take notice of that which he gives others notice.

A sign posted which reads "Adults Only" is admissible to show scienter. See *People v. Adler*, 25 Cal. App. 3d 24, 100 Cal. Rptr. 726 (1972); *People v. Harris*, 192 Cal. App. 2d 887, 13 Cal. Rptr. 542 (1961); *Cherokee*

News and Arcade, Inc. v. State, 509 P. 2d 917 (Okla. Crim. App. 1973); *Orito v. State*, 55 Wis. 2d 161, 197 N.W. 2d 763 (1972).

A sign posted which reads "X-rated—Potentially Offensive to Some People" is admissible on the issue of scienter. *Price v. Commonwealth*, 213 Va. 113, 189 S.E. 2d 324 (1972).

In the case of *Nash v. United States*, 229 U.S. 373 (1913), the Court said:

> "In many instances a man's fate depends upon his rightly estimating, that is as the jury subsequently estimates it, some matter of degree, and there is no constitutional difficulty in the way of enforcing the criminal provisions of the Sherman Anti Trust Act on the ground of uncertainty as to the prohibitions."
>
> Whenever the law draws a line, there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk. *Nash v. United States*, supra; *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). One who goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340.
>
> The evidence necessary to prove guilty knowledge in the prosecution of one charged with the exhibition of an obscene motion picture film differs greatly with that necessary to show guilty knowledge on the part of a book dealer charged with distributing obscene books.

> ". . . It would be impossible for a book dealer to familiarize himself with the contents of all the books he offers for sale, and proof of guilty knowledge would certainly be a condition precedent to conviction. The exhibitors of motion pictures, however, cannot seriously contend any lack of knowledge of the contents of a particular film. It is relatively easy and also the responsibility of film exhibitors to preview a motion picture before releasing it for public showing. . . ." *Hosey v. Jackson*, 309 F. Supp. 527, 532 (S.D. Miss. 1970), reversed on other grounds 401 U.S. 987 (1971).

In summary, on the question of scienter, the Georgia law requires and the jury was instructed that the State must prove, as a bare minimum, that the Petitioner had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" is required by *Rosen v. United States*, supra; "in some manner aware" was sufficient in *Mishkin v. New York*, supra; "reason to know" was sufficient in *Ginsberg v. New York*, supra; "be aware of the character of the matter" was sufficient in *Kuhns v. California*, supra; eyewitness testimony that the Petitioner viewed the film is not necessary, *Smith v. California*, supra; proof of knowledge of the legal status of the material is not required, *Hamling v. United States*, supra; and under the rationale of *Hosey v. Jackson*, supra, in a film case such as this, guilty knowledge may be presumed.

III.

THE MOTION PICTURE FILM "BEHIND THE GREEN DOOR" IS OBSCENE AND IS THEREFORE NOT PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The trial jury, after receiving proper charges as to the law involved, applied the law and returned its verdict finding the motion picture film "Behind the Green Door" obscene.

In its opinion on review of this case, the Court of Appeals of Georgia in describing the film wrote:

> "Our duty to uphold the constitutional guarantees is no less than that of the justices of the respective Supreme Courts of the United States and of this State, and although we abhor even the suggestion of censorship we nevertheless viewed an exhibition of this film in its entirety. . . .
>
> The film, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest. It is without redeeming social value, and it is a shameful and morbid exhibition of nudity with particular and all-encompassing emphasis on sexual acts. It goes substantially beyond customary limits of candor in representing and portraying nudity and sex. The film presents patently offensive exhibitions and representations of ultimate sexual acts and manipulations, normal and perverted. It shows unabashedly offensive and lewd views of the genitals of both male and female participants, and is replete with portrayals of individual and group acts of masturbation, cunnilingus, fellatio and sexual intercourse. It is degrading to sex. Except for the

opening and a few other scenes toward the conclusion, it is rank, hard core pornography, and each exhibition in the theatre was 'a public portrayal of hard core sexual conduct for its own sake, and (presumably) for the ensuing commercial gain.' *Miller v. California*, 413 U.S. 15, 35, supra. The film 'Behind the Green Door' is obscene as a matter of constitutional law and fact, and is unprotected by the First and Fourteenth Amendments." . . . *Ballew v. The State*, 138 Ga. App. 530.

Petitioner cites a long line of cases in support of his contention that this Court should make an independent review and determination of obscenity vel non. It appears to be his contention that this Court should make an independent review and determination of obscenity vel non on all materials brought into question in the State Courts. With the exception of *Jenkins v. Georgia*, 418 U.S. 153 (1974), all the cases cited by the Petitioner were decided during the period between *Roth v. United States*, 354 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 15 (1973); a period when no majority of the Court could agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power, and at which time convictions were reversed by this Court summarily.

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e.g., *Redrup v. New York*, 386 U.S. at 770-771, 87 S. Ct. at 1415-1416. We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' *Interstate Circuit, Inc. v. Dallas*, 390

> U.S., at 704-705, 88 S. Ct. at 1314 (Harlan, J., concurring and dissenting)." . . . *Miller v. California*, 413 U.S. 15, 22, 88 S. Ct. 2607, 2614.
>
> "In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy.' See *Walker v. Ohio*, 398 U.S. 434-435, 90 S. Ct. 1884, 26 L. Ed. 2d 385 (1970) (dissenting opinions of Burger, C. J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." *Miller v. California*, 413 U.S. 15, 88 S. Ct. 2607, 2614 (Footnote 3).

In *Jenkins v. Georgia*, supra, the film "Carnal Knowledge" was in question and the scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. Such is not the case in the film "Behind the Green Door" where, not only does the camera focus on the bodies of the "actors" while engaged in "ultimate sexual acts," but it shows offensive and lewd views of the genitals of both male and female participants.

Petitioner contends that the motion picture film "Behind the Green Door" is an artistic work of national acclaim. There is absolutely nothing in the record or the transcript of the evidence in this case to support that contention.

Petitioner urges the Court to lift all checks and restraints on the distribution of obscene materials because of the widespread concern over our overworked judiciary. We, too, are concerned over our overworked judiciary. We in the prosecutorial field are a part of the same system that finds itself overworked because of the high incidence of criminal activity. Is this sufficient reason to back off, to shirk our duty and to let the purveyors of filth have a free hand? Would the Petitioner suggest that the Court give pill peddlers, burglars, rapists, robbers, murderers, or any of them a free hand because of concern over our overworked judiciary?

The motion picture film "Behind the Green Door" is hard-core pornography at its worst and its showing by the Petitioner on both occasions for which he was convicted was "calculated purveyance of filth."

CONCLUSION

For all the foregoing reasons, Respondent urges the Court to affirm the conviction in this case.

Respectfully submitted,

LEONARD W. RHODES
Assistant Solicitor General
State Court of Fulton County
Counsel for Respondent

53 State Court Building
160 Pryor Street, S.W.
Atlanta, Georgia 30303
(404) 572-2911

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of The Supreme Court of the United States in good standing, and that I have this day deposited in the United States Mail three (3) copies of the foregoing Brief of Respondent with first-class postage prepaid, addressed to Robert Eugene Smith, Esquire, 1409 Peachtree Street, N.E., Atlanta, Georgia 30309, Attorney for Petitioner.

This _____ day of July, 1977.

LEONARD W. RHODES
Counsel for Respondent

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

NO. 76-761

CLAUDE D. BALLEW, *Petitioner,*

vs.

STATE OF GEORGIA, *Respondent.*

ON WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

Brief Amicus Curiae of Citizens for Decency Through Law, Inc., in support of the respondent State of Georgia.

Charles H. Keating, Jr.
919 Provident Tower
Cincinnati, Ohio 45202

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, California 91352

Counsel for Amicus Curiae
Citizens for Decency
Through Law, Inc.

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Interest of Amicus Curiae.

Citizens for Decency through Law, Inc., (short title C.D.L., formerly Citizens for Decent Literature Inc.) an Ohio Corporation, with local affiliates throughout the United States, is a non-profit, non-sectarian and non-political corporation with national headquarters in Cleveland, Ohio, formed for and dedicated to the support of this nation's obscenity laws by cooperating

with law enforcement in the enforcement of the obscenity laws.[1/]

CDL's interest as amicus curiae on behalf of the Respondent State of Georgia lies in its concern: (1) that the decision of the Georgia Court of Appeals, upholding Ballew's criminal obscenity conviction and jail sentence of one year, should be affirmed on the merits, and (2) that, in fulfilling its historic responsibility as the "custos morum" of this nation, the majority of this Court should speak out against the type of hard-core pornography, herein under consideration, to the fullest extent possible within the framework of this appeal.

Amicus submits that this Court, in its review of the film "Behind the Green Door" should take advantage of the opportunity presented in this case to publish the fact that such film is the type of "hard-core" obscenity which is unlawful under federal as well as state obscenity standards. See Smith v. U.S. __U.S.__,52 LEd2d 324, 337,97SCt __ (May 23, 1977). A personal acknowledgment of this order is sorely needed

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[1/] The written consents of the petitioner and the respondent have been requested under Rule 42.2 and both parties have consented in writing. Copies of such consents are being filed with this Court, concurrently with this Amicus Curiae Brief.

at the present time, to serve as a measure of encouragement[2/] for those state and federal prosecutors who were disillusioned by this Court's perfunctory "remand" orders in June of 1973. Contrary to what the majority of this Court must have intended, the Miller et al. decisions have

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[2/] It is an unfortunate fact of life that this Court is really only "heard" when it speaks through its formal written opinions. During the 1974 and 1975 October Terms, this Court had before it for review two other criminal obscenity convictions from the State of Georgia, involving the same Georgia obscenity statute and two equally notorious "hard-core" films. Dyke v. State of Georgia ("Devil in Miss Jones") 232 Ga 817, 209 S.E.2d 166 (Sept. 24, 1974) and Sanders v State of Georgia ("Deep Throat") 234 Ga 586, 216 S.E.2d 838 (June 2, 1975). This Court's action in those cases was to simply deny certiorari. See Dyke v. State of Georgia 421 U.S. 952, 44 LEd2d 106, 95 SCt 1687 (April 28, 1975) and Sanders v. State of Georgia, 424 U.S. 931, 47 LEd2d 340, 96 SCt 1145 (February 23, 1976), rehearing denied in 425 U.S. 945, 48 LEd2d 189, 96 SCt 1687 (April 19, 1976). Amicus submits that had the majority of this Court granted plenary review of those cases and considered the "contraband" nature of such films, it would have done more to solve this nations's present "hard-core" problem than was accomplished by all of this court's obscenity opinions during the past five terms of court. It would have had the additional positive value of requiring dissenting Justices Brennan, Stewart, and Marshall to justify their defense of "obscenity" in the light of the autoptical evidence rather than in the abstract.

not provided the spark which would ignite law enforcement efforts and bring about a curtailment of this nation's obscenity problems. Indeed, the psychological effect resulting from this Court's remand of 50 of such cases has brought about the opposite result.[3/]

The film "Behind the Green Door" is a part of the outfall created by the indecisive manner in which the majority of this Court dealt with the obscenity problem during the 1972 October Term. In San Francisco, where the producers of "Behind the Green Door" are located, District Attorney Ferdon dismissed more than 200 pending obscenity cases following the Miller remands. Both he and his successor have abandoned efforts to enforce the obscenity statutes in that area. Concurrently, the San Francisco based producers of "Behind the Green Door" graduated from their former business of producing porno shorts and made the transition to full length porno features, five of which (including the film "Behind the Green Door") have received copyright certificates from the Copyright Office of the Library of

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3/ See New York University Law Review, vol. 52, No. 4 (publication date Dec. 1977), "The Effect of Miller v. California: an Empirical Analysis", as reported in the Los Angeles Daily Law Journal on April 1, 1977.

Congress.[4/]

In several brief opinions during the past term, dissenting Justice Paul Stevens has suggested to the majority that the "criminal enforcement of obscenity law" has outlived the usefulness it has enjoyed during the two hundred years of this nation's existence, and has advanced an unorthodox opinion that "However distasteful these materials are to some of us, they are nevertheless a form of communication and enter-

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4/ By title, those films are: "Behind the Green Door", "Resurrection of Eve", "Sodom and Gomorrah", "Inside Marilyn Chambers", and "Autobiography of a Flea". All are unadulterated hard-core pornography. A certified copy of the Copyright Office of the Library of Congress Certificate of Registration of a Claim to Copyright in a Motion Picture, Registration No. MP 24594, Class L-M, applied for on November 8, 1973 and issued for the film "Behind the Green Door" is attached to this Brief at Appendix "B". In an unreported decision in Mitchell Brothers Film Group v. Cinema Adult Theater, et al., in the U.S. District Court for the Northern District of Texas, CA-3-74-645-D, a copy of which is attached to this Brief at Appendix "C", the U.S. District Court on September 2, 1976 held such film to be obscene under federal standards and not entitled to copyright protection. That case is presently on appeal. Amicus submits that this incredible development in the copyright area can be short circuited through the simple expediency of this Court's reviewing the film "Behind the Green Door" in the light of federal standards and declaring it to be what it clearly is---hard-core pornography (hence, uncopyrightable).

tainment acceptable to a substantial segment of society; otherwise, they would have no value in the marketplace . . . " Marks v. U.S. __ U.S. ___ 51 LEd2d 260, 269 97 SCt __ (March 1, 1977). Amicus respectfully submits that Justice Stevens' brief remarks were made without a thorough analysis and complete probe to the heart of this Court's problem. To suggest that government should capitulate because the problem has not been solved, but has only grown worse, is to admit defeat without an investigation of the cause for such defeat. We submit that a more judicious approach would involve a re-examination of what has been done in the past, to search for possible errors which this court might have sponsored. Such a probe would necessitate an examination of the performance of those justices who, as the "custos morum" of this nation, took part in the judicial process during the 20 years prior to Justice Stevens' appointment to the bench, and whose value judgments, right or wrong, have been a concomitant part of this present problem involving the proliferation of hard-core pornography.

As applied to the present claims which are being asserted in defense of the hard-core film, "Behind the Green Door", a number of nagging questions present themselves in retrospect, such

as, (1) whether this Court did not commit fundamental error in its judgment in 1964 when it rejected the rationale and equitable principles espoused by the Ohio Judiciary in its almost unanimous opinion in Ohio v. Jacobellis: "Lex Citius Tolerare Vult Privatum Damnum Quam Publicum Malum (The law will rather permit a private loss (or damage) than a public evil)." See also, the rationale applied by the New York Court of Appeal in the civil lawsuit Trans-Lux Dist. Corp. v. Bd of Regents (" A Stranger Knocks") 248 N.Y.S. 2d 857, 863 (March 26, 1964):

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays. Since no other profession is privilieged to bend public morals, policy and law to its internal craft standards, then neither should producers of films."

which was undercut during the following term by this Court's summary action in Trans-Lux Dist. Corp. v. Bd. of Regents 380 U.S. 259 (March 15, 1965). Still another nagging question was raised by Justice Stevens himself in Marks, supra, at page 260, where he states that the dictum first suggested in Stanley v Georgia 394 U.S. 557, 22 LEd2d 542, 89 SCt 1243, (April 7,

1969), that a person "has a constitutional right to possess obscene matter" necessarily requires the "illogical premise that a person may be prosecuted criminally for providing another with material he has a constitutional right to possess." For a differing view which does not require the "illogical premise" which Justice Stevens envisions, and which, consistent with Stanley v. Georgia, supra, asserts, in a civil lawsuit context, the non-existence of any right to possess "contraband", see the Wisconsin Supreme Court speaking in Wisconsin v. Voshart 39 Wisc2d 419, 159 N.W.2d 1 at 9 (June 7, 1968).

It is not irreverent to suggest that a re-evaluation of what has transpired in the past 20 years would demonstrate that had this Court not broken with tradition and rejected the moral judgments of the highest courts in Ohio (Jacobellis) and New York (Trans-Lux), which held that explicit sexual intercourse was not a fit subject for entertainment on the public motion picture screen, and had it expressly qualified the dictum of Stanley, supra, by an application of the Voshart principle, the hard-core inundation which now faces this nation, at the advent of its third century of existence, would never have come into being - - not in three hundred years.

OPINIONS BELOW

The decision of the Court of Appeals of Georgia is reported in Claude D. Ballew v. State of Georgia, 138 Ga.App. 530, 227 S.E.2d 65 (Apr. 6, 1976). On May 6, 1976 the Court of Appeals denied a rehearing, and on July 9, 1976 the Georgia Supreme Court denied a writ of certiorari. Copies of the opinion of the Court of Appeals and the other orders denying a rehearing and writ of certiorari are attached to this Brief at Appendix "A".

QUESTIONS PRESENTED

1. Whether a jury composed of five persons is sufficient to afford an accused in a criminal prosecution to the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether a standard of scienter which authorizes obscenity convictions on mere "constructive" knowledge impermissibly chills the dissemination of expression protected under the First and Fourteenth Amendments to the United States Constitution.

3. Whether the motion picture film "Behind

the Green Door" is, as a matter of applicable constitutional law, protected expression under the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On November 9, 1973, two Investigators for the Office of the Solicitor General for the Criminal Court of Fulton County went to the Paris Art Theatre located in Fulton County, Georgia. The film "Behind the Green Door" was advertised by title on the marquee. Both Investigators were experienced in the criminal prosecution of obscene materials.

After paying a consideration, they entered the theatre and viewed the motion picture film entitled "Behind the Green Door". After viewing the film, the Investigators obtained a search warrant. The warrant was served on the same day (November 9, 1976) and the film was seized as evidence after it had again been viewed to make sure it was the same film.

The Appellant, Claude D. Ballew, and a Mr. Pace, who is not a party here, were present at the theatre both at the time of the first viewing and at the time of the execution of the search warrant. The Investigators bought a ticket from Mr. Pace, and the Appellant Ballew, standing with

Mr. Pace behind the cash register, pushed the button to unlock the door into the theatre proper. At the time the warrant was served, Mr. Pace was at the cash register and Appellant Ballew was in the projection room. Following the arrest of both parties, Appellant Ballew checked the cash register and locked the door to the theatre.

A commitment hearing as to the first arrest was waived on November 26, 1973. On November 26, 1973, after the waiver of the commitment hearing, the same Investigators visited the Paris Adult Theatre to see if the same film was playing. "Behind the Green Door" was still on the marquee.

The Investigators then entered the theatre to view the film, and the Appellant Ballew and Mr. Pace were again present. When the Investigators tried to buy a ticket from Mr. Pace, he asked Appellant Ballew to take the money. Appellant Ballew told Mr. Pace to accept because "You're the cashier." But Mr. Pace protested and stated (to Ballew) "But you're the manager," or "You run the place." Appellant Ballew finally took the money.

The film showing on November 26th was identical to the film shown on November 9th. After viewing the film, the Investigators obtained another search warrant. When this search

warrant was executed on November 27th, Appellant Ballew and Mr. Pace were again present. Both were arrested for the second time and Appellant Ballew again locked the theatre.

A two count accusation was filed alleging a violation of Ga. Code Ann. 26-2101 on two specified dates, the dates being essential averments to the transactions.

Trial was begun on May 22, 1975 and the jury returned a verdict of guilty. A motion for new trial was filed and, after being heard, was overruled on September 29, 1975. On April 6, 1976, the conviction was affirmed by the Court of Appeals of Georgia, and on July 9, 1976, the Supreme Court of Georgia denied certiorari.

SUMMARY OF ARGUMENT

I

The Sixth Amendment Right to Trial by Jury as applied to the States through the Fourteenth Amendment does not prevent the State of Georgia from adopting a procedure which provides for the trial of misdemeanor criminal cases to a jury of five persons.

The criminal procedure employed by the trial court below is authorized by the Georgia Constitution and Georgia Statutes. The Georgia constitution authorizes the General Assembly to prescribe any number, not less than five, to constitute a trial jury except in the Superior Court where twelve jurors are mandatory.

The Criminal Court of Fulton County is a court of limited jurisdiction which may only try misdemeanors. By statute, only five jurors are required for the trial of such cases. Jury verdicts in the criminal court of Fulton County must be unanimous as they must be in all Georgia county courts.

In Williams v. Georgia, this Court held during the 1969 October Term that a six-man jury was constitutionally acceptable in state trials in the Sixth and Fourteenth Amendments.

In an appendix to Justice Harlan's concurring opinion in Williams, reference was made to the Georgia criminal procedure which authorized a jury of five in criminal misdemeanor cases in the criminal court of Fulton County. In its majority opinion in Williams, this court pointed out at footnote 28 on page 91, with reference to Justice Harlan's opinion, that:

> "We have no occasion in this case to determine what minimum number can still constitute 'jury', but we do not doubt that six is above that minimum."

Since "six" was above the minimum, it must necessarily follow that a jury of one less number (5) must be within the minimum number.

During the 1971 Term of court, this court's decision in Johnson v. Louisiana, 406 U.S. 356, had occasion to examine in the context of an equal protection claim, the Louisiana criminal procedure which authorized a jury of five persons and which required a unanimous verdict. The majority of the Court in Johnson cited with approval its previous holding in Williams v. Florida for the proposition that states are free to try defendants with juries of less than twelve persons. The Johnson Court also stated that the question of whether the burden of proof by the state should be the

verdict of nine out of twelve jurors, or a unanimous verdict of five jurors, was a matter of the judgment of the Louisiana legislature.

During the 1975 October Term of Court, this Court had before it the identical issue in Sanders v. State of Georgia, 75-707 in a Petition for a Writ of Certiorari which was filed by the attorneys of record herein. In Sanders the Georgia Supreme Court had upheld the constitutionality of the Georgia five-man jury. The Petition for Writ of Certiorari was denied by a majority of this court in Sanders v. State of Georgia, 424 U.S. 931. A Petition for Rehearing was also denied in 425 U.S. 945.

Petitioner's argument that the decrease in size of jury from six persons to five persons has the effect of making such a jury's verdict on "community standards" a constitutionally infirm determination, loses its vitality when considered in the light of this court's ruling on similar matters in Johnson v. Louisiana. Relative to the certainty of proof on the trial issues, as effected by the size of the jury, this court pointed out that it was sufficient for constitutional purposes that the agreement of only nine of twelve jurors be reached for conviction, in a criminal case on the issue "beyond a reasonable doubt", and that in such

a case the vote of three jurors for acquittal did not impeach the verdict of the other nine. The Johnson Court pointed out that the fact that only nine agreed on the issued did not demonstrate that the conviction was based on a lower standard proof.

It should be noted that in Johnson, the appellant made the opposite argument to that being made here, that is that it was easier to convince nine out of twelve persons on a twelve-man jury than to convince all five on a five-man jury. This Court's comment was that, in any event, it was a matter for the judgment of the legislature.

An argument that, by lessening the number of jurors which are available for deliberation the deliberation on community standards will suffer, is faced with a counter-argument that smaller groups stimulate discussion, and that cases where the juries are required to apply their personal knowledge as a basis for determining contemporary community standards, accurate decisions depend upon jury participation and full discussion. Studies indicate that the larger groups tend to inhibit discussion, and that more active participation by all members is achieved as a result of the reduction of number in the jurors.

Even were one to concede that the petitioner's argument may have some validity in cases where no evidence was offered, other than the subject matters itself, that situation is under the control of the parties to the action who may, at their election, choose to introduce additional evidence for the jury's consideration on the "contemporary community standards".

II

The jury instructions on "scienter" comply with the constitutional requirements set by this court. Petitioner's arguments which focus on one sentence of the jury instruction, are faulty for 2 reasons: (1) the petitioner's analysis of that portion of the instruction fails to accord to the language of that challenged sentence the interpretation to which it is entitled under the constitutional principles established in Hamling v. U.S., 418 U.S. 87, and (2) such challenge fails to consider the instructions on the "scienter" issue as a whole, and in their relation to the charge, and to the evidence produced at the trial.

Petitioner's objection to the jury instruction on "scienter" is based upon certain language taken from the most recent pronouncement of

this court on "scienter" in Hamling v. U.S., supra at page 123. Petitioner's contention that the prosecution must show that he "had" knowledge rather than that he "should have had" knowledge of the content, character and nature of the material distributed, is clearly an incorrect reading of Hamling. That argument fails to take into account the paragraph in Hamling which immediately precedes the paragraph upon which petitioner has based his argument. The preceding paragraph in Hamling refers to this Court's decision on "scienter" in Ginsberg v. New York, 390 U.S. 629 which the Hamling Court reaffirmed. By reaffirming, the court approved the language in Ginsberg reading "knowingly" was defined in the statute as "knowledge" of, or "reason to know" of the character and content of the materials." The word "knew" in the paragraph which followed in Hamling, upon which petitioner relies, really includes "reason to know" as was explained by the Hamling Court in the preceding paragraph in its approval of the language in Ginsberg v. New York. The "reason to know" language approved in Ginsberg v. New York and Hamling v. U.S. is the equivalent of the prosecutorial burden "should have had knowledge", upon which petitioner bases his entire objection herein.

Subjective knowledge is clearly not the constitutional requirement for "knowledge". On the contrary, the defendants conviction must stand even though the jury may be satisfied that subjectively, the defendant exhibited the film without knowing the obscene nature thereof.

To properly interpret the Petitioner's basis for his attack on the jury instructions, requires an analysis of the "state of mind" spectrum which may exist "subjectively" in any person who exhibits a motion picture film which is obscene as a matter of fact. Degrees of a person's subjective "knowledge of the fact" and "knowledge contrary to the fact" are analyzed by Professor Rollin M. Perkins in his text "Perkins on Criminal Law, Foundation Press, Second Edition, page 775" and "Perkins, A Rationale of Mens Rea, 52 Harvard Law Review 905 (1939). Five categories are discussed. Drawing upon Professor Perkins' analysis, the meaning of "knowledge" as it relates to the "scienter" requirement for the obscenity crime can be similarly diagrammed. In general, those categories are as follows: (1) guilty knowledge, (2) guilty belief which is correct, (3) guilty avoidance of knowledge, (4) bona-fide belief contrary to fact, resulting from negli-

gence (either criminal or ordinary), and (5) bona-fide belief contrary to fact, based upon reasonable grounds - honest mistake.

The "scienter" requirements came into the law through Justice Brennan's opinion in Smith v. California, 361 U.S. 147. In that case, the Smith court had occasion to refer to the California statute which it discussed in its prior opinion in California v. Alberts, 354 U.S. 495. The court in Smith said "The General California Obscenity Statute, Penal Code Section 311 requires "scienter", note 3, and was, of course sustained by Roth v. U.S.". An examination of the "scienter" provision of section 311 shows that it had been interpreted by the appellate courts in California as follows: "A defendant is not guilty of violating Penal Code section 311 unless he had knowledge of the character of the material. People v. Wepplo, supra, 947, 78 Cal.App. 2d 959, 964, 178 Pac.2d 853. To the word "knowledge" we would add "or notice" meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the material. To appear profound we refer to this knowledge or notice as scienter." The "Scienter" provision of the California statute which was inferentially

approved by the Roth court is substantially the same which was faced by the Respondent State of Georgia in the trial court below, under the jury's instructions which are under attack herein. (See category (4) above.) There is no doubt that "subjective" knowledge was not a requirement under the California test.

The Smith Court did, however, leave a small area undecided, that is whether the defense of "honest mistake" (see category (5) above) in certain cases might be essential as a matter of constitutional principles. In voicing this caveat, a question was raised as to the continued validity of Rosen v. U.S., 161 U.S. 606 (1896) the longstanding Supreme Court case authority in this area which had been cited with approval in Roth v. U.S., 354 U.S. 476. If "honest mistake" were to be a defense, then, not withstanding Rosen v. U.S., the "mens rea" requirement must reflect a "subjective" standard to some extent in that the defendant would, in certain cases, have the opportunity to offer evidence on "good faith belief" and be entitled to an instruction as to that defense. It had generally been accepted that the Rosen case made subjective knowledge of obscenity completely irrelevant.

All questions as to the force and validity

of Rosen v. U.S. were put to rest in Hamling v. U.S., where this court upheld the instruction of the trial court in Hamling, supra, that the defendant's belief as to the obscenity or nonobscenity of the material is irrelevant. (Category (5) above, is not available as a defense.)

At page 13 of his brief, Petitioner attacks the Georgia obscenity statute as applied to him, and makes an argument that such a requirement has a "chilling effect" on free speech. The answer to that argument is found in U.S. District Court Judge George C. Young's dissent in Russ Meyer et al. v. T. Edward Austin, State Attorney for the Fourth Judicial District in and for the State of Florida, 319 F.Supp. 457, where he said: "Chilling of First Amendment Rights is, of course, proscribed by the Constitution. But obscenity does not have such protection and the "chilling" of obscenity is not only permissible but a legitimate interest of the state."

This Court should not inquire into the constitutionality of a state statute, or its component parts, in the abstract. U.S. v. Raines, 362 U.S. 17. Similarly, Petitioner may not direct his objections to an isolated portion of the jury's instructions. One of

the basic principles of a jury trial is the requirement that a charge to the jury must be read in its entirety. An examination of all of the other instructions on the issue of "scienter" show that the jury was properly instructed on "scienter".

Further, in relation to the evidence which was presented, those instructions fairly and accurately stated the law of the case. The circumstantial evidence which was before the jury on the "scienter" issue, as to Count 1, demonstrates that the jury was justifying in concluding from: petitioner's presence at the theater; the nature of the theater; the pornographic nature of the single film which was being exhibited; his actions, which gave the appearance of being the person in charge; that he, at the very least, had "knowledge of facts which would put a reasonable prudent man on notice as to the obscene nature of the film" (Category (4) above)and that he was an "aider and abetter" as to its exhibition. The circumstantial proof as to Count II is even stronger and would support a finding that he had knowledge of the obscene nature thereof. (See Category (3) above.)

III

The film "Behind the Green Door" is hard-core pornography and contraband under federal standards. This court's action in Ballew v. State of Georgia was an unlimited grant of a petition for writ of certiorari, which squarely places before this court the critical question as to whether the film "Behind the Green Door" is hard-core pornography and contraband under federal standards. Although the issue as framed by Petitioners in question 3 may technically be resolved without considering federal standards, as by a simple reply that the film is not protected by the First and Fourteenth amendments, this court should not consider the question to be so limited. While such a determination would avoid an application of federal standards, it would permit the petitioner to continue making indirect challenges to the federal obscenity laws without suffering any of the consequences. Amicus submits that this court, in recognition of its broad responsibility for the effective administrative and execution of the federal obscenity laws, should treat question 3 as presenting the broad question as framed by the Petitioner's own request at page 19 of

his brief reading: "The Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity vel non of the nationally acclaimed motion picture film "Behind the Green Door" upon which the Petitioner's conviction rests."

The disposition of hard-core pornography is inherently a matter for federal control. In Congress, the several states have assembled and established a comprehensive set of controls on obscenity over (1) importation from abroad, (2) use of the mails, and (3) transportation in interstate commerce. In the case of international movement, controls have been supplemented by treaty abroad. By the weight of judicial authority, such subject matter is regarded as uncopyrightable under federal laws. Material which is obscene under federal standards is also contraband.

In view of the above widespread federal legislation, obscenity is not simply a matter of state interest, it is under the "one people" concept, a matter of state and federal interest. Under the "one-people" concept of federalism, the federal government is envisioned as having been granted plenary control and charged with the duty and responsibility of administering those controls which have been established

by their representatives at the national level; in a way which will safeguard the standards of public decency (morality) which are common to the individual State members of the compact. Under the "one-people" concept, the federal government would have total control over the subject matter as to which reasonable minds would not differ and all would hold to be pornographic - hard-core pornography.

Independant federal interest have been "identified" by this court in the well-documented views of Justice Harlan in his obscenity decisions. See Roth v. U.S. , 354 U.S. at 497-498. Justice Harlan was using as a common denominator the "bottom of the barrel" quality of material, as to which it might be said that reasonable minds would not differ, and could come to but one conclusion. Under the Justice Harlan view and the "one-people" concept, it was the expectation of the compact states that the federal government would administer those powers to suppress that subject matter which was considered by the States as a whole to be injurious to public morals, as declared by their representatives in federal legislation.

Where the subject matter involves blatant, hard-core pornography federal standards are drawn in issue. When Congress exercises a

granted power, the federal legislation may displace state law under the supremacy clause. In a situation such as this, where the federal statutes clearly point to a total restrain of hard-core pornography, the federal compact must be given recognition, and federal preemption as to the category "hard-core" pornography is clearly in order.

While Congress has never established a federal definition on obscenity, it has specifically held that traffic in obscenity and pornography is a matter of national concern. See Section 1 of Public Law 90-100. See also Senate Resolution No. 477, rejecting the findings and recommendations of the Commission on Obscenity and Pornography, which recommended the liberation of obscenity.

In Smith v. U.S. the majority of this court restated the following basic principles in the federal area of obscenity: (1) the regulation of obscenity is a matter of particular federal concern; (2) federal as well as state interests are concerned; and (3) where a conflict exists, the principles of federal supremacy must prevail. For the above reasons, this court should not avoid the issues which have been drawn by the petitioner but should determine whether or not the films "Behind

the Green Door" is obscene under federal law.

In his brief at page 20, the petitioner has requested the majority of this court to reconsider the landmark decisions in Miller v. California and its companion cases. No valid reasons are given for such reconsideration. As recently as March 1, 1977, this court reaffirmed the existence of those federal standards in Marks v. U.S. ___U.S.___ (Mar. 1, 1977). Having specifically defined the standards of this nation over four years ago, this court should now apply those federal standards in a meaningful manner which will shed some light as to what those abstract standards mean, in terms of the law and the moral values of this nation as a whole.

Clearly, the motion picture "Behind the Green Door" constitutes subject matter which is proscribed and declared illegal (contraband) under the federal test articulated by this court in Miller v. California and its companion cases. Such subject matter (1) taken as a whole, appeals to a prurient interest in sex, (2) portrays in a patently offensive way sexual conduct specifically defined by law, and (3) taken as a whole, does not have serious literary, political, social, artistic, or scientific value.

For purposes of "instant" analysis, amicus has attached to this brief at Appendix "D" and Appendix "E" an accurate continuity and time-and-motion study of the film "Behind the Green Door". The sexual conduct which is portrayed in a patently offensive way, and which offends the above stated federal standards, is set forth, with appropriate references to where such explicit sexual conduct appears in the time-and-motion study.

Petitioner's irresponsible claim to this court that the subject matter described above is a "nationally acclaimed motion picture film" explains the frustration felt by law enforcement officials today as they view the courtroom scene. What is needed, at the present time, is an acknowledgment that "common sense" still prevails, and an exercise of the type of judgment immortalized by Hans Christian Anderson in his fable "The Emperor's New Clothes".

The views against obscenity prosecution which Justices Brennan, Stewart, and Marshall currently espouse, run contrary to the nature of man and in words of Alexander Pope "embrace" the "Monster Vice". In addressing himself to this subject in U.S. v. Four (4) Books, 289 F.Supp. 972, U.S. District Judge Pierson

Hall opened his remarks with a reference to the observation of Alexander Pope, written 200 years before, in his "Essay on Man". "Vice is a monster of so vile a mien, As, to be hated, needs but to be seen; Yet seen too oft, familiar with her face, We first endure, then pity, then embrace." The suggestion made by Petitioner that the conduct described herein should be legalized because such cases "place an incredible strain upon the rare resouces of judicial time and energies", etc. is nothing less than a bold argument that, because we have "seen", "hated", "familiarized ourselves with" and "endured", the "Monster Vice", we should now "pity" and "embrace" it. The same and similar arguments were made and rejected by a clear majority of this Court in the Miller decisions.

While a new majority of this Court has been formed which, hopefully, may be able to restore some lawful order to what has been regarded as a hopeless "Court" situation, the fact that Petitioner herein has been able to gain support from Justice Stevens' recent arrival on the bench in 1975 requires some renewed effort to fix the responsibility the remaining dissenting members for the unsatisfactory conditions which presently exist.

There is an extraordinary amount of hard evidence, which the members of this Court cannot fail to take note of, that this country is "in extremes" in relation to its public morals and enforcement of the criminal laws. That condition did not exist ten years ago in 1964, when Justice Brennan's plurality opinion was announced in Ohio v. Jacobellis and became the controlling precedent. There was little hard-core pornography on the black market. Its potential presence on the public screen was then unthinkable. Less than 13 years later, under the influence of Justice Brennan's opinions, the public screens and neighborhoods are now overrun with such materials. Even worse, they have found their way into cheap videotape reproductions and are presently being marketed for private T.V. consumption in the homes of those neighborhoods. Similarly, in the year 1964, there was little public evidence of any widespread sexual molestation of children, and none in relation to the production of pornography. In the year 1977, the extent of "child pornography" is a matter of public disgrace. The decisions of this Court prior to 1973 are clearly responsible for these unfortunate 1977 developments. Except for the decisions written by the present

dissenting justices in the years 1964 to 1973, the neighborhoods of this nation would not be flooded by hard-core pornography and would not be visited with the problem of "child pornography".

Justice Stevens' statement in his separate opinion in Smith v. U.S. that he believes that "criminal prosecutions are an unacceptable method of abating a public nuisance which is entitled to at least a modicum of First Amendment protection" does not give proper consideration to Alexander Pope's warning on the nature of man noted above, and what the past decisions of this Court have wrought in the past 20 years. It would appear that Justices Brennan, Stewart and Marshall, by continuing in their efforts to perpetualize all they have done and said in their pre-1973 opinions, are expressing a willingness to "accept and embrace the Monster Vice." If Justice Stevens is willing to accept this Court's pre-1973 performance, and the resulting consequences which exist today, and join Justices Brennan, Stewart and Marshall in their present views, then certainly his opinion in Smith must also be read as expressing a willingness to "accept and embrace the Monster Vice".

ARGUMENT

I

THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT DOES NOT PREVENT THE STATE OF GEORGIA FROM ADOPTING A PROCEDURE WHICH PROVIDES FOR THE TRIAL OF MISDEMEANOR CRIMINAL CASES TO A JURY OF FIVE PERSONS.

A. The Criminal Procedure Employed By the Trial Court Below Is Authorized By the Georgia Constitution and Georgia Statutes.

The Georgia Constitution authorizies the General Assembly to prescribe any number, not less than five, to constitute a trial jury except in the Superior Court where twelve jurors are mandatory. See Code Ann., Section 2-5101, Constitution, Art. VI, Section XVI, paragraph 1.

The Criminal Court of Fulton County is a Court of limited jurisdiction which may only try misdemeanors. By statute, only five jurors are required for the trial of such cases. Such juries are composed of five persons, selected from a panel of twelve. The defendant is

entitled to four preemptory strikes and the State three, with the defendant getting first and last preemptory strikes. Georgia Laws 1890-1891, Vol. 2, P. 935, as amended by Georgia Laws 1935, P. 498. Sanders v. State of Georgia 216 SE.2d 838, 839 (June 2, 1975). Jury verdicts in the Criminal Court of Fulton County must be unanimous as they must be in all Georgia Courts. Ball v. Georgia 9 Ga.App. 162, 20 S.E.2d 888 (1911).

B. Recent Decisions of This Court Have Made It Clear That, Where The Requirement of Unanimity Is Retained, The Trial Of A Criminal Case To A Five- Man Jury Does Not Violate Constitutional Principles.

During the 1969 October Term of this Court, a solid majority held (with Justice Marshall dissenting and Justice Blackmun not participating) that a six-man jury was constitutionally acceptable in state trials under the Sixth and Fourteenth Amendments. Williams v. Georgia 399 U.S. 78, 26 L.Ed2d 446, 90 S.Ct. 1893, (June 22, 1970). In an appendix to Justice Harlan's concurring opinion in Williams, reference was made to the Georgia criminal procedure which authorized a jury of five in criminal misdemeanor cases in the Criminal Court of Fulton County (Atlanta), at page 139:

> "Georgia: Constitution, Art I, Section 2-105, Art VI, Section 2-5101; Ga. Code Ann Section 27-2506 (Supp 1968); Ga Laws 1890-1891, pp 935, 939, 942. (In county criminal courts, which have jurisdiction of misdemeanors -- cases in which the maximum sentence imposable is a fine of up to $1000 or imprisonment for a term of up to 12 months or both — a defendant may demand a jury trial. Depending upon the county, however, a jury ranges in size from five to 12 persons. The Criminal Court of Atlanta, for example, tries misdemeanors with juries of five. In Hall County the same crimes are tried by juries of 12.)"

In holding that the fact the jury at common law was composed of precisely 12 was "a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics'", see Williams at page 102, the Court also pointed out at footnote 28 on page 91, [5] with respect to Justice Harlan's opinion and comment as to jury sizes below six,

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[5] Amicus submits that Petitioner is incorrect in his interpretation of footnote 28 as applied to the five-man jury. (See Brief of Petitioner at p. 4.)

> ". . . the Court in Williams left open the question of what minimum number of jurors is required to guarantee the constitutional right to jury trial in state criminal cases. 399 U.S. at 91 fn. 28 . . ."

that:

> "We have no occasion in this case to determine what minimum number can still constitute a 'jury', but we do not doubt that six is above that minimum" (our emphasis)

Since "six" was "above the minimum" which could constitute a "jury", it must necessarily follow from the opinion as a whole and the plain language meaning of that footnote (unless it is to be interpreted as being inadvertent language) that a jury of one less number (five) would be within the minimum number which would constitute a "jury" under the meaning of the U.S. Constitution.

During the 1971 Term of Court, the above interpretation was reinforced by this Court's decision in Johnson v. Louisiana 406 U.S. 356, 32 L.Ed2d 152, 92 S.Ct. 1620 (May 22, 1972). There, the Louisiana criminal procedure which authorized a jury of five persons and which required a unanimous verdict, was considered by this Court in the context of an equal protection claim that the Louisiana constitutional and statutory provisions, authorizing a verdict by nine of twelve jurors in criminal cases in which the punishment was necessarily at hard labor, was invalid since unanimity was required in twelve-man jury capital cases, and in five-man jury cases in which punishment at hard labor might be imposed.

In Johnson, the majority of the Court (Justices White, Burger, Rehniquist, Blackmun and Powell) rejected that claim as it applied to the five man jury and cited with apparent approval this Court's previous holding in Williams v. Florida, supra, that states are free to try defendants with juries of less than 12 men. See Johnson v. Louisiana, 406 U.S. 356 at 364:

> "In order to 'facilitate, expedite, and reduce expense in the administration of criminal justice,' State v. Lewis, 129 La 800, 804, 56 So. 893, 894 (1911), Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12 were required for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. Williams v. Florida, 399 U.S. 78, 26 L.Ed2d 446, 90 S.Ct 1893 (1970). Three jurors here voted to acquit, but from what we have earlier said, this does not demonstrate that appellant was convicted on a lower standard of proof. To obtain a conviction in any of the categories under Louisiana law, the State must prove guilt beyond reasonable doubt, but the number of jurors who must be so

> convinced increases with the seriousness of the crime and the severity of the punishment that may be imposed. We perceive nothing unconstitutional or invidiuously discriminatory, however, in a State's insisting that its burden of proof be carried with more jurors where more serious crimes or more severe punishments are at issue. (our emphasis)

The majority of the Court also made it clear that whether the burden of proof by the State should be the verdict of 9 out of 12 jurors, or a unanimous verdict of 5 jurors was a matter for the judgment of the Louisiana Legislature. See Johnson v. Louisiana, supra, at page 364:

> "As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense."

During the 1975 October Term the identical issue, as is herein present, was before this Court in Sanders v. State of Georgia No. 75-707 in a petition which was filed by the [illegible]rneys

of record herein. There the defendant Sanders was charged with a misdemeanor obscenity violation of Criminal Code Section 26-2101 in connection with the exhibition of the film "Deep Throat" in Atlanta, Georgia. The defendant's objection to the 5-man jury was in the form of a motion for a jury of not less than 12 jurors, which was denied by the Criminal Court of Fulton County. On appeal, the Georgia Supreme Court upheld the constitutionality of the Georgia 5-man jury in Sanders v. State of Georgia 216 S.E.2d 838, 839 (June 2, 1975), in the following opinion:

> "Appellant's motion for a trial by a jury of not less than twelve jurors was properly denied by the trial court. Only five jurors are required by statute for the trial of misdemeanor cases in the Criminal Court of Fulton County. See Ga.L. 1890-91, Vol. 2, p. 935, as amended by Ga.L. 1935, p. 498. The present Constitution authorizies the General Assembly to prescribe any number, not less than five, to constitute a trial jury except in the superior court where twelve jurors are mandatory. See Code Ann. Section 2-5101, Const. art. VI, Section XVI, par. 1.
>
> "Appellant also argues that a jury of five persons is 'constitutionally inadequate' because it denies him equal protection of the law. We reject this argument in view of Georgia

> authority to the contrary. See McIntyre v. State,190 Ga. 872(5), 11 S.E.2d 5. The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a "jury." In Williams v. Florida, 399 U.S. 78, 92,90 S.Ct. 1893, 1901, 26 L.Ed2d 446 (Fn. 28) it is observed 'We have no occasion in this case to determine what minimum number can still constitute a 'jury' but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts."

A petition for writ of certiorari was denied [6/] by a majority of this Court in Sanders v. State of Georgia, 424 U.S. 931, 47 L.Ed2d 340, 96 S.Ct. 1145 (Feb. 23, 1976), with only Justice Brennan, Stewart and Marshall voting to grant the writ and reverse. The vote to reverse was on the

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[6/] See Supreme Court Practice, Stern and Gressman, Fourth Edition, at pp. 213-218, Section 5-7, Significance of Denial of Certiorari. In view of the hard-core nature of the film "Deep Throat", and the inherent problems in this area, if the Sanders case did not merit full review, would not swift and practical justice have been better served by the majority taking a cue from the action of the dissenting minority and voting to grant the writ of certiorari and summarily affirming?

authority of the dissenting justice's obscenity opinion in Miller v. California 413 U.S. 15, and did not consider the five-man jury issue which was raised. A petition for rehearing was also denied in 425 U.S. 945, 48 L.Ed2d 189, 96 S.Ct. 1687 (April 19, 1976).

C. Petitioner's Arguments Present No Questions Which Have Not Previously Been Answered By This Court.

Petitioner's argument at page 6 of his Brief that the decrease in size of a jury from 6 persons to 5 persons has the effect of making such a jury's verdict on "community standards" a constitutionally infirm determination because:

> "With each decrease in size, there is an increase in the likelihood of judging any material by a small group containing by chance, highly susceptible and/or totally insensitive persons. The smaller the group the larger the voice of such minority viewpoints . . ."

loses its vitality when considered in the light of this Court's ruling on similar matters in Johnson v. Louisiana, supra. Relative to the certainty of proof on any issue, as affected by the size of the jury, this Court stated in Johnson at p. 362:

> "Of course, the State's proof could be regarded as more certain if it had

> convinced all 12 jurors instead of only nine; it would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors. But the fact remains that nine jurors - a substantial majority of the jury - were convinced by the evidence. In our view disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenter's views, remains convinced of guilt . . . " (our emphasis)

Petitioner's argument that, as a matter of constitutional principles, the integrity of a unanimous verdict of 5 jurors on "community standards" is improved by requiring additional jurors is not supported by the Johnson case ruling. Under Johnson, where the size of the jury in a state case is increased to 12 persons, it is sufficient for constitutional purposes that the agreement of only 9 of those 12 be reached for conviction. In such a case the vote of three jurors for acquittal does not impeach the verdict of the other nine nor does it demonstrate that guilt had not, in fact, been proven beyond a reasonable doubt. As to such verdicts, the Court stated at page 360:

> ". . . it is our view that the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity

> or the accuracy of the majority verdict of guilt."

See also Johnson, supra at page 364, where this Court said:

> "Three jurors here voted to acquit, but from what we have earlier said, this does not demonstrate that appellant was convicted on a lower standard of proof. . . "

It should be noted that, in Johnson, the appellant made the opposite argument i.e. that it was easier to convince 9 of 12 persons on a 12 person jury than to convince all of the five on a 5 person jury. There the Court stated that, in any event, it was a matter for the judgment of the legislature, at page 364:

> "As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature . . . "

An argument that the above rule can be distinguished as to the issue of "community standards" on the grounds that, by lessening the number of jurors which are available for deliberation, such a determination will suffer since the number of view-points available in the jury discussion have been diminished, is

faced with a counter argument that smaller groups stimulate discussion. In cases where the juries are required to apply their personal knowledge as a basis for determining contemporary community standards, accurate decisions depend upon juror participation and full discussion. "While the critics believe that reducing the size of a jury will limit the constructive participation of a wide variety of members of contrasting backgrounds representing the 'community conscience', studies indicate that in fact the larger groups tend to inhibit discussion, and more active participation by all members is achieved as a result of the reduction" Powell, U. Mich. J.L. Reform 5:87 Fall 1971.

Even were one to concede that the petitioner's argument may have some validity in cases where no evidence is offered, other than the subject matter itself, that situation is under the control of the parties to the action. The jury need not be left solely to apply their individual subjective interpretations for either party may, at his election, choose to introduce evidence for the jury's consideration on the contemporary community standards, Hamling v. U.S., 418 U.S. at 106.

II

THE JURY INSTRUCTIONS ON "SCIENTER" COMPLY WITH THE CONSTITUTIONAL REQUIREMENTS SET BY THIS COURT.

At page 11 of his brief, Petitioner has focused this Court's attention on one isolated sentence of the trial court's jury instruction on the mens rea element of the Georgia obscenity crime and, relying upon that single challenge, claims reversible error for failure to comply with the "scienter" requirements established by this Court. Petitioner's attack is faulty for two reasons: (1) Petitioner's analyis of that portion of the instruction which is under attack fails to accord to the language of that challenged sentence the interpretation to which it is entitled under the constitutional principles established in Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (June 24, 1974), and (2) such challenge fails to consider the instructions on the "scienter" issue as a whole, and in their relation to (a) the accusation which was read to the jury and (b) the evidence which was introduced at the trial.

A. Petitioner's Challenge To A Portion of the Jury Instructions on "Scienter" Is In Error In Its Failure To Comprehend All of What This Court Said In Hamling v. U.S.

Petitioner's objection to the jury instruction on "scienter" appears at page 11 in the Brief for Petitioner. The language of the instruction which is objected to reads as follows:

> "The word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge of the obscene content if he has the knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." (our emphasis)

Thereafter, petitioner stated his objection to the above portion of the instruction as:

> "It authorizes a conviction predicated on mere 'constructive' rather than actual knowledge."

As the basis for this objection, petitioner relies upon certain language taken from the most recent pronouncement of this Court on "scienter" found in Hamling v. U.S., supra, at page 123. That portion of the Hamling opinion upon which petitioner relies, reads:

> "We think the 'knowingly' language of 18 U.S.C. §1461 and the instructions

> given by the district court in this case satisfy the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that the defendant had knowledge of the contents of material he distributes, and that he knew the character and nature of the materials." 418 U.S., at 123 (emphasis added).

Petitioner's analysis of the above language in Hamling, and basis for his claim that the above described jury instruction is erroneous, appears at page 12 of his brief and reads:

> "Consistent with the above statement from Hamling, Petitioner contends that the prosecution must show that he 'had' knowledge rather than that he 'should have had' knowledge of the content, character and nature of the materials distributed." (emphasis added).

Clearly, this is an incorrect reading of Hamling, for it fails to take into account the paragraph in Hamling which immediately precedes the above paragraph upon which petitioner has based his argument. The omitted paragraph in Hamling, which is decisive against his claim, refers to this Court's decision on "scienter" in Ginsberg v. N.Y., 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274 (Apr. 22, 1968) and reads as follows:

> "The Mishkin holding was reaffirmed in Ginsberg v. New York, 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274 (1968). There the Court was again faced with the sufficiency of the scienter requirement of another New York statute, which proscribed the 'knowing' distribution of obscene materials to minors. 'Knowingly' was defined in the statute as 'knowledge' of, or 'reason to know' of the character and content of the material. Citing Mishkin, and the New York Court of Appeals' construction of the other similar statutory language, the Court rejected the challenge to the scienter provision." (Our emphasis.)

The Hamling Court, by reaffirming the validity of the language in Ginsberg v. N.Y. reading:

> "'Knowingly' was defined in the statute as 'knowledge' of, or 'reason to know' of the character and content of the material." (Our emphasis)

clearly established the validity of the portion of the jury instruction herein under attack. The word "knew" in the paragraph which followed in Hamling, upon which Petitioner relies, taken from the sentence "knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials", really includes "reason to know" as was explained by the Hamling court in the preceeding paragraph in its approval of the language in Ginsberg v. New York of "'knowledge' of, or 'reason to know' of the

character and content of the material."

Similarly, the "reason to know" language, approved in Ginsberg v. N.Y. and Hamling v. U.S. is the equivalent of the prosecutorial burden "should have had knowledge", upon which petitioner bases his entire objection (see p. 27, supra).

The above analysis shows petitioner to be clearly in error when he states, in the concluding paragraph of his argument on "scienter" (Brief for Petitioner at page 18) that:

> "What Petitioner does contend is that he cannot be convicted in the absence of proof of what he actually knew, whether this actual knowledge is proved by circumstantial evidence or otherwise. Georgia's scienter standard encompassing constructive knowledge goes beyond this by imposing a duty to make inquiry whenever a jury decides that a reasonable and prudent person would have done so."
> (Our emphasis.)

Subjective knowledge is clearly not the constitutional requirement for "knowledge". On the contrary, the defendant's conviction must stand even though the jury may be satisfied that, subjectively, the defendant exhibited the film without knowing the obscene nature thereof, which was the language in the accusation as read to the jury.

(1) An Analysis of the Defendant's State of Mind in Relation to the Mental Element of "Knowledge".

To properly interpret the petitioner's basis for his attack on the jury instruction requires an analysis of the state of mind spectrum which may exist "subjectively" in any person who exhibits a motion picture film which is obscene as a matter of fact. Degrees of a person's subjective "knowledge of the fact" and "knowledge contrary to the fact" are listed below in chronological order.

(1) He may have been aware of the fact that the film was obscene from personal evaluation (knowledge of the fact);

(2) He may have believed the fact the film was obscene, but his awareness was not from personal evaluation (knowledge of the fact);

(3) He may have been aware that he had not the slightest notion whether the film was obscene or not (avoidance of knowledge);

(4) He may have believed the film not obscene, but have had no reasonable grounds for his belief (knowledge contrary to the fact—ordinary or criminal negligence);

(5) He may have believed the film not

obscene, but have had reasonable grounds for his belief (knowledge contrary to the fact—free from any taint of negligence—honest mistake).

Addressing himself to the above range in attitudes on "knowledge" as applied to crimes, in general, Professor Rollin M. Perkins notes that the two extremes (1) and (5) require little comment. (Perkins, A Rationale of Mens Rea., 52 Harv. L.Rev. 905 (1939); Perkins on Criminal Law, Foundation Press, Second Edition at p. 775. Only in the most theoretical discussions would it be questioned that, as to category (1), one has knowledge of facts of which he has been made aware by his own observations. Similarly it would not be suggested that, as to category (5), one has knowledge of facts when he has a bona fide belief otherwise, based upon reasonable grounds. So far as guilt knowledge is concerned, such a person would be treated as if the facts were as they reasonably appeared to him to be, unless (a) the particular offense does not require mens rea for conviction, i.e., traffic offense, or (b) the deeds even under the circumstances as they were reasonably supposed to be, would have involved such a degree of social fault that the doer may properly be held to have acted at his peril in this regard. In

the latter instance, as in the case of statutory rape, the state of mind in category (5) has generally been interpreted by the courts to be no defense. One who has unlawful intercourse with a girl under the age of consent is guilty of statutory rape although he reasonably believed she was over that age.

Category (2) is regarded as "knowledge" as that word is used in regard to mens rea. The distinction between category 2 and category 3 is the difference between an actual "belief" and a mere fugitive doubt based upon no grounds at all.

Category (3), "guilty avoidance of knowledge" may take either of two forms: One with a deliberate anti-social purpose in mind may make a positive statement purporting to be based upon his own knowledge, being fully aware that he has no such knowledge, in order to forestall an inquiry into the facts by another, or to mislead an inquiry in a proceeding such as the trial of a case; or one with a similar purpose may deliberately "shut his eyes" to avoid knowing what would otherwise be obvious to view. In such cases, so far as the criminal law is concerned, the person acts at his peril in this regard, and is treated as having "knowledge" of the facts as they are ultimately discovered

to be.

Awareness of fault is the characteristic which distinguishes category (3) from category (4). In category (4), belief contrary to the fact not based upon reasonable grounds, there is no awareness of fault. The belief is entertained but was acquired as a result of negligence.

Categories (1), (2) and (3) are distinguishable from categories (4) and (5) in that in categories (4) and (5), the subjective belief is actually contrary to the fact. Category (4) results from negligence, and category (5) without reference to negligence.

Drawing upon Professor Perkins' analysis of the meaning of "knowledge" as a mens rea requirement for crimes in general, the meaning of "knowledge" as it relates to the "scienter" requirement for the obscenity crime can be diagramed as follows:

"Knowledge"

(1) Guilty knowledge. Awareness of the fact as a result of personal observation.

(2) Guilty belief which is correct.

(3) Guilty avoidance of knowledge.

(a) Guilty statement as of knowledge by one who is aware that he does not know,—which statement

turns out to be contrary to the fact.

(b) Guilty "shutting of the eyes" for fear of discovering the fact which an investigation would have disclosed.

(4) Bona-fide belief contrary to fact resulting from negligence. (Criminal or ordinary).

(5) Bona-fide belief contrary to fact but based upon reasonable grounds (without reference to negligence--honest mistake).[6a/]

(2) The Scope of "Scienter" Requirement as Established in Smith v. California and Confirmed in Hamling v. U.S.

The "scienter" requirement came into the law through Justice Brennan's opinion in Smith v. California 361 U.S. 147, 80 S.Ct. 215, 4 L. Ed.2d 205 (Dec. 14, 1959).

Eleazar Smith operated a retail book and magazine store in Los Angeles. Among his stock was a book entitled Sweeter Than Life by Mark Tryon, published by an obscure publisher, Vixen Press. A Los Angeles police officer bought some magazines and a copy of the book from a clerk in Smith's store and then arrested the clerk.

At the time of Smith's arrest, two obscenity laws were operative in the Los Angeles jurisdiction: The California obscenity statute, and a Los Angeles city ordinance on obscenity.

6a/ See footnote 7 on page 41 supra.

Smith was charged only with a violation of the city ordinance. The difference in the two criminal sanctions was explained by Judge Swain in his dissenting opinion in People v. Smith, 161 Cal. App. 2d 860, 237 P.2d 636 (June 23, 1958), which affirmed Smith's conviction at page 641:

> "A defendant is not guilty of violating Penal Code Section 311 unless he had knowledge of the character of the material. People v. Wepplo, supra, 947, 78 Cal.App.2d 959, 964, 178 P.2d 853. To the word 'knowledge' we would add 'or notice,' meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials. To appear profound, we refer to this knowledge or notice as 'scienter.' Under the city ordinance the prosecution does not have to prove scienter; under the Penal Code section, it does. . ." (Our emphasis)

The trial court found Smith guilty and sentenced him to 30 days in jail. The Appellate Department of the Superior Court affirmed the judgment.

On appeal to this Court, Justice Brennan in the majority opinion (joined by Warren, Clark, Stewart and Whittaker) reversed the judgment, ruling that a state cannot constitutionally eliminate all mental elements from the crime; because

to do so seriously restricted the dissemination of books that are not obscene.

The prosecutor's concern was voiced during arguments in the Smith case. If the Smith judgment were reversed, it would establish that a "mental element" was required, but it would also leave a void. What was the state of mind that had to be proved? How great or how slight was that burden of proof? How do the people, in fact, establish such proof? The Smith opinion answered the people's fears that the prosecution of obscenity would be impossible if a "scienter" requirement were introduced, and in doing so established, what to Amicus seemed to be rather clear guidelines, at page 154:

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, The Role of the Will in Law,' 68 Harvard Law Review 1, cf. American Communications Association v. Douds, 339 U.S. 382, 411, 94 L.Ed. 925, 950, 70 S.Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element

> in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." (Our emphasis.)

The language "proving his awareness of its contents" seemed to negate any argument that "subjective" knowledge was a requirement.

The Smith Court at page 152, footnote 9, also cited with approval the scienter requirement of the California obscenity statute considered in California v. Alberts (Roth-Alberts), 354 U.S. 495, 1 L.Ed.2d 1498, 77 S.Ct. 1314 (1957) and sustained in that case:

> "The General California Obscenity Statute, Penal Code Section 311 requires scienter, see note 3, and was of course sustained by us in Roth v. U.S." (Our emphasis.)

As stated above at p. 35, the judicial construction given by the California courts to the California statute which was before this Court in the Smith case appeared in California v. Smith, 161 Cal.App.2d 860, 237 P.2d 636 (June 23, 1958):

> "A defendant is not guilty of violating Penal Code Section 311 unless he had knowledge of the character of the material. People v. Wepplo, supra, 947, 78 Cal. App.2d 959, 964, 178 P.2d 853. To the word 'knowledge' we would add 'or notice,' meaning

> thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials. To appear profound, we refer to this knowledge or notice as 'scienter.'" (Our emphasis.)

Given the principle that this Court must accept a state court's construction of a statute, General Trust Co. v. Blodgett, 287 U.S. 509, 513; Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688, it would appear that this Court saw no constitutional problems with the "scienter" test imposed therein. The prosecutor's burden under California v. Alberts was "knowledge of the character of the material or knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials, and is substantially the same which was faced by the Respondent State of Georgia in the trial court below under the jury instructions which are under attack herein. See p.26 supra.

There is little doubt that "subjective" knowledge was not a requirement under this California test. As in the trial court below, "objective" knowledge was sufficient--the measuring rod was the reasonable and prudent person, not the defendant's state of mind. A reasonable classification of the prosecutor's burden in the Alberts case would certainly include category

(4) above.

The Smith Court did however leave a small area undecided—whether the defense of "honest mistake" in certain cases might be essential as a matter of constitutional principle, at page 155:

> "We need not and most definitely do not pass today on...whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse. . ." (Our emphasis.)

In voicing this caveat, a question was raised as to the continued validity of Rosen v. U.S., 161 U.S. 606 (1896), the long standing Supreme Court case authority in this area which had been cited with approval in Roth v. U.S., 354 U.S. 476, at 491 fn. 28. If "honest mistake" were to be a defense then, notwithstanding Rosen v. U.S., the mens rea" requirement must reflect a "subjective" standard to some extent in that the defendant would, in certain cases, have the opportunity to offer evidence on "good faith belief" and be entitled to an instruction as to that defense.

It had generally been accepted that the Rosen case made subjective knowledge of obscenity completely irrelevant. There the defendant was convicted under a federal statute which

made it a misdemeanor to "knowingly deposit obscene matter in the mail." The trial court had refused to give a jury instruction which provided that the jury must acquit if it entertained a reasonable doubt whether the defendant knew that the matter was obscene. On appeal, the U.S. Supreme Court said at page 610:

> "The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice, at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute had been violated. Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what

> must be deemed obscene, lewd and lascivious." (Our emphasis.)

All questions as to the force and validity of Rosen v. U.S. were put to rest in Hamling v. U.S., supra, when this Court upheld the instruction of the trial court in Hamling, supra, that the defendant's belief as to the obscenity or nonobscenity of the material is irrelevant. See Hamling v. U.S., supra, at p. 622.

The Rosen case in 1896, was, in short, a public policy statement by the High Court that when one deliberately enters the distribution field of material of a sexually descriptive nature, he takes the risk of offending current community standards and must be held accountable if he does. All objections to the strong public policy expressed in the Rosen case should have been dispelled by this Court's 1973 decisions in Miller, et al, which added the requirement of specificity etc.[7/] If it be thought, as petitioner herein claims, that the law expressed in Rosen puts too great a burden of prescience on defendants, the answer is, in the words of Mr. Justice Holmes, in Nash v. U.S., 229 U.S. 373, 377, cited in Tyomies Publishing Co. v. U.S., 211 Fed. 385:

[7/] Under Miller, supra, a category (5) situation (honest mistake) becomes largely theoretical. See page 34, supra, footnote 6(a).

"The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here, he may incur the penalty of death. . ."

B. The Georgia Obscenity Statute Was Constitutionally Applied. The Jury Instructions, Considered As A Whole, State The Law of the Case Clearly and Fairly.

At page 13 of his Brief, Petitioner attacks the Georgia obscenity statute as applied to him, and makes the same "chilling effect" argument which has been advanced, at some point, in almost every obscenity case from Smith v. California, supra, to the present time. See Brief for Petitioner at page 12 reading:

"There is virtually no evidence at all in the record that Petitioner had any knowledge, constructive or otherwise, of the nature, character or contents of the film with which he is charged. The only evidence at all relating to this issue is a statement by another employee that Petitioner is the manager of the theatre. There was no evidence whatever that he had personally viewed the film, nor was there any evidence at all as to the general fare in the theatre.

"Petitioner complains of the chilling effect upon the distribution of

non-obscene but sexually oriented matter that a constructive knowledge standard of scienter must necessarily produce. It was precisely such a chilling effect which concerned this Court in its examination of the Los Angeles obscenity ordinance which completely dispensed with the scienter requirement. Smith v. California, 361 U.S. 147 (1959). As in Smith, Petitioner here complains of the self-censorship produced by the lowered scienter standard which will impose 'a restriction upon the distribution of constitutionally protected as well as obscene literature.' 361 U.S., at 153".

An appropriate (but rarely cited) response to Petitioner's "chilling effect" argument was made by U.S. District Court Judge George C. Young, dissenting from a three-judge court decision in Russ Meyer, Eve Productions, Inc., Jack Vaughan and Jack Vaughan Productions, Inc. v. T. Edward Austin State Attorney for the Fourth Judicial Circuit in and for the State of Florida, et al., 319 F.Supp. 457, 475 (July 23, 1970):[8]

"The majority opinion directs the return to the Citizens for Decent

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[8] In retrospect, it would appear that U.S. District Court Judge Young's dissenting opinion has since been vindicated. See Huffman v. Pursue Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (Mar. 18, 1975).

Literature, Inc., of a transcript with pictures of the film Vixen which that organization had filed with the Court as amicus curiae. The question of obscenity of that film has not been resolved by this Court or the majority opinion. In fact, that was properly an issue before the state court which has been divested of its authority on that issue by this Court. An examination of the transcript and pictures of the film clearly reveals that it was subject to the challenge of obscenity and while this opinion makes no effort to make such a decision, it is unfortunate that the state court was not permitted to finally determine this issue.

> "'Chilling' of First Amendment rights is, of course, proscribed by the Constitution. But obscenity does not have such protection and the 'chilling' of obscenity is not only permissible but a legitimate interest of the state. The majority opinion expresses concern over the finding that the state proceeding 'chilled' the rights of Vixen's promoters. But who can say from the record that such 'chilling' was not justified in the state's efforts to suppress obscenity?" (Our emphasis.)

Amicus submits that Petitioner's arguments on "chilling effect" are inapposite, and that U.S. District Court Judge Young's remarks on that "score" state the correct rule of law which should be applied generally in obscenity cases --- and, particularly, in this case. See the time-motion

study and continuity for the film "Behind the Green Door" appearing in this Brief at Appendix "D" and Appendix "E".

This Court will not, and should not in this case, inquire into the constitutionality of a state statute, or its component parts, in the abstract. See United States v. Raines, 362 U.S. 17, (1960) at page 21:

> "This Court, as in the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudicate the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Immigration, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. U.S. v. Wurzbach, 280 U.S. 396." (Our emphasis.)

Similarly, Petitioner may not, in objecting to the application of the statute to his actions, direct his objections to an isolated portion of the jury instructions. One of the basic principals of a jury trial is the requirement that a charge to the jury must be read in its entirety, and a party may not complain as to the giving of a certain instruction where the charge as a whole states the law of the case, fairly and accurately, 75 Am Jur.2d Trial §924 at p. 791; Agnew v. U.S., 165 U.S. 36, 50, 41 L.Ed. 624, 17 S.Ct. 235 (Jan. 11, 1897).

Counts I and II of the accusation charged that the defendant, on the two days involved, (Nov. 9, 1973 and Nov. 27, 1973) "did, knowing the obscene nature thereof, exhibit a motion picture film entitled, 'Behind the Green Door'" (A7, A8). In explanation of the term "knowing" as used in the accusation, the Court instructed the jury that:

> ". . . the word, 'knowing,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge of the obscene content if he has the knowledge of facts which would put a reasonable prudent man on notice as to the suspect nature of the material."

In addition to the above instruction on constructive knowledge of the obscene content, based upon knowledge of facts which would put a reasonable prudent man on notice, the Court also charged the jury as follows, in relation to the element of "knowledge" as it was to be applied to the facts which had been placed in evidence. See Appendix at page A 13.

> "Additionally, that the defendant did the act with knowledge, and the Court has charged you that knowledge should be the knowledge of a prudent person. Whether he knew it actually or should have known it, constructive knowledge, that a prudent person under the facts and circumstances as given by the witness here, should have known of the nature of the film being exhibit, that it was obscene and he intended to exhibit the film. You have to find beyond a reasonable doubt that he intended to exhibit the film or that he aided, counseled, abetted and participated in the exhibition of the film, or the intent to exhibit it with the knowledge of its content, with the knowledge that its contents were obscene within the definition of obscenity under Georgia law, or that he as a reasonable prudent man, considering the circumstances should have known."

See also, Appendix at page A 16 (as to Count 1);

> "Ladies and Gentlemen of the Jury, the decision as to all matters of fact.

I can only say to you again as I have said to you heretofore, that the issue in this case is formed by the charges made by this Accusation against this defendant. And this defendant's plea of not guilty thereto.

"Now, Ladies and Gentlemen of the Jury, if you believe beyond a reasonable doubt that the defendant, in the County of Fulton, and State of Georgia, at anytime within the two years immediately preceding the date of the swearing out of this Accusation, did, in the County of Fulton, and the State of Georgia, on the 9th day of November, 1973, and this is Count One, commit the offense of distributing obscene materials in violation of the Georgia Code Section 26-2101, in that the said accused did knowing the obscene nature thereof, exhibit a motion picture film entitled, "Behind the Green Door,". . . "

It seems abundantly clear, from the above instructions, taken as a whole, that the jury was properly instructed on the issue of "scienter" insofar as the federal requirement is concerned. Further, in relation to the evidence which was presented, those instructions fairly and accurately stated the law of the case.

The circumstantial evidence which was before the jury on the "scienter" issue as to Count I (Nov. 9, 1973) was as follows:

(1) The theater was an "adult theater".

(2) The film "Behind the Green Door",

objectively appraised is 73 minutes of continuous hard-core pornography. That fact is instantaneously discernable. (See Appendix "E" to this brief.)

(3) The film "Behind the Green Door" was advertised on the marquee by name.

(4) Petitioner was present at the theater on Nov. 9, 1973 both at the time of the first viewing by the officers and much later, at the time of execution of the search warrant.

(5) Petitioner was in the projection room at the time the search warrant was executed.

(6) Petitioner performed acts which tended to show his operational control over the premises. He pushed the button to unlock the door into the theater proper when the officers first viewed the film. After the arrest, he checked the cash register and locked the door to the theater.

The jury was justified in concluding from the Petitioner's presence at the theater on Nov. 9, 1973, the nature of the theater, the pornographic nature of the single film which was being exhibited, and his actions which gave the appearance of being those of a person in

charge, that, at the very least, he had "knowledge of facts which would put a reasonable prudent man on notice as to the obscene nature of the film", and that he was an "aider and abetter" as to its exhibition. See Category (4) at page 34, supra.

The circumstantial evidence which was before the jury on the "scienter" issue as to Count II (Nov. 26, 1973) was as follows:

(1) The theater was an "adult theater".

(2) The film "Behind the Green Door", objectively appraised, is 73 minutes of hard-core pornography. That fact is instantaneously discernable. (See Appendix "E" to this brief.)

(3) The film "Behind the Green Door" was advertised on the marquee by name.

(4) The film had been playing at that theater for a substantial period of time (at least two weeks, Nov. 9th - 26th).

(5) Petitioner was present and performed acts which inferred that he was in control of the premises when the film played there on Nov. 9, 1973 and was arrested in connection with that exhibition. In legal proceedings preceding the second exhibition on Nov. 26, 1973, he waived a commitment hearing (that there was "probable cause" for the Nov. 9th arrest).

(6) Petitioner performed acts at the time of the Nov. 26th arrest which tended to show that he was the person in operational control of the theater. He gave instructions to the cashier, received money when the cashier refused to take the same, and locked the place following the second arrest.

The jury was justified in concluding from the petitioner's presence at the theater, the adult nature of the theater, the pornographic nature of the single film which had been advertised and exhibited at the theater for a substantial period of time, the fact that he gave the appearance of being the person in operational control, and his waiver of "probable cause" as to the first arrest at the commitment hearing on Nov. 26, 1973, that he performed his functions at the theater on Nov. 26, 1973 "knowing the obscene nature thereof" (category (3)) or, at the very least, had "knowledge of facts which would put a reasonable prudent man on notice as to the obscene nature of the film" (category 4) and that he was an aider and abetter as to its exhibition.

III

THE FILM "BEHIND THE GREEN DOOR" IS HARD-CORE PORNOGRAPHY AND CONTRABAND UNDER FEDERAL STANDARDS.

This Court's action in Ballew v. State of Georgia, ___ U.S. ___, 50 L.Ed.2d 789, ___ S.Ct. ___ (Jan. 25, 1977), was an unlimited grant of the petition for writ of certiorari. That Order places before this Court all three of the questions which were presented in the petition, including Question 3, reading in part: "Whether the motion picture film 'Behind the Green Door'. . . constitutes speech protected by the First and Fourteenth Amendments to the U. S. Constitution." Assuming that the Georgia Court of Appeals was correct in its rulings on the first federal question involving the 5-man jury issue, and the second federal question involving the Georgia statutory standard for "scienter", then this Court has squarely before it the critical question as to whether the film "Behind the Green Door" is hard-core pornography and contraband under federal standards. 8/

8/ The definitional aspect of the Georgia obscenity statute does not present a federal question. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69, 37 L.Ed.2d 446, 464, 93 S.Ct. 2628

Although the majority of this Court may avoid facing this issue, see Justice White's separate opinion in J-R Distributors, Inc., et al. v. Washington, 418 U.S. 949, 41 L.Ed.2d 1166, 94 S.Ct. 3217 (July 25, 1974) at 1167:

> "As for the materials on file, it is sufficiently clear to me that they fall within the category of hard-core pornography unprotected by the First Amendment that plenary review is not required. One of the publications involved is Sex Between Humans and Animals. Mr. Justice Brennan would apparently hold that the First Amendment prohibits government from denying consenting adults access to such material, but I do not construe the First Amendment as preventing the States from prohibiting the distribution of a publication

(June 21, 1973), affirmed on the original decision in Slaton v. Paris Adult Theatre, et al., 231 Ga. 312, 201 S.E.2d 456, 460 (Oct. 30, 1973), petition for writ of certiorari denied in Paris Adult Theatre I et al. v. Slaton, 418 U.S. 939, 41 L.Ed.2d 1173, 94 S.Ct. 3227 (July 25, 1974), with Justices Brennan, Stewart, and Marshall dissenting. Although the issue as framed by Question 3 may technically be resolved by an answer that the film is not protected by the First and Fourteenth Amendments, other considerations noted herein would seem to require that the subject matter should be considered in the light of the broader question as to whether the film is also obscene under federal standards. See page 61, infra.

whose dominant theme is represented by repeated photographs of men and women performing sex acts with a variety of animals." Mr. Justice Brennan, with whom Mr. Justice Stewart and Mr. Justice Marshall join, dissenting.

Amicus submits that it should not do so. See page 3, supra, at footnote 2. Because of the critical problems which all of law enforcement presently face in the obscenity area, the question of the hard-core nature of the film "Behind the Green Door" does today present a substantial federal question. See pages 4-8, supra.

A. The Disposition of "Hard-Core Pornography" Is, Inherently, A Matter for Federal Control.

In Congress, the several states have assembled and established a comprehensive set of federal controls on obscenity over (1) importation from abroad, (2) use of the mails, and (3) transportation in interstate commerce. See 18 U.S.C. Sections 1461-1465, 1735, 1737; 19 U.S.C. Section 1305. In the case of international movement, those controls have been supplemented by treaty abroad. See Roth v. U. S., 354 U.S. 476 at 484. By the weight of judicial authority, such subject matter is regarded as uncopyrightable under federal laws. See Mitchell Brothers Film Group, et al. v. Cinema Adult Theatre, et al., a copy

of which appears at Appendix C to this Brief. See also Section 8 of Article I of the United States Constitution and Title 17 U.S.C. Material which is obscene under federal standards is contraband, See U. S. v. Obscene Magazines, 382 F.Supp. 975 at 976 (Oct. 1, 1974). See also Burke v. Kingsley Books, Inc., 142 N.Y.S.2d 735, 208 Misc. 150, affirmed 151 N.Y.S.2d 639, 1 N.Y.2d 177, 134 N.E.2d 461, affirmed Kingsley Books , Inc. v. Brown, 354 U.S. 436, 1 L.Ed.2d 1469, 77 S.Ct. 1325 (June 24, 1957).

In view of the wide-spread state and federal legislation, obscenity is not simple a matter of state interest. It is, under the "one people" concept, a matter of state and federal interest.[9/] The "one people" concept of federalism, (see Hoke v. U. S., 27 U.S. 308 (Feb. 24, 1913), envisions the federal government as having been granted plenary power and charged with the concomitant duty and responsibility of administering

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9/ See Part XIV entitled "The 'One People' Concept", appearing in "The Challenge of a Modern Federal Criminal Code, Statement in the U. S. Senate by Senator John L. McClellan, March 11, 1971, in Hearings Before the Subcommittee on Criminal Law and Procedure of the Committee on the Judiciary, U. S. Senate, Ninety-Second Congress, First Session, Part 1", at page 30.

those controls, which have been established by their representatives at the national level, in a way which will safeguard the standards of public decency (morality) which are common to the individual State members of the compact. Under the "one people" concept, the federal government would have total control over subject matter as to which reasonable minds would not differ and all would hold to be pornographic (hard-core pornography).

Independent federal interests have been "identified" by this Court in the well-documented views of Justice Harlan. See, for example, Roth v. U. S., 354 U.S. at 497-498. In enumerating his hard-core pornography rule limitation on federal power, Justice Harlan was using as a common denominator that "bottom of the barrel" quality of material as to which it might be said that reasonable minds would not differ, and could come to but one conclusion.[10/]

10/ Conceptually speaking, obscenity might be visualized as a polluted liquid of varying densities contained within a barrel, with hard-core pornography, with the heaviest density, lying at the bottom of the barrel. Protected free speech can be visualized as that clear liquid which overflows and lies outside the barrel. That subject matter which lies inside the barrel and on top of the density layer which is "hard-core pornography" is non-protected subject matter, which states may legalize or proscribe in their discretion.

Amicus submits that the foundation for Justice Harlan's views are to be found in the "one people" concept, that is, that by granting such powers to the Federal government, it was the expectation of the compact States that the Federal government would administer those powers to suppress that subject matter which was considered by the States as a whole to be injurious to public morals, as declared by their representatives in federal legislation.

B. Where the Subject Matter Involves Blatant Hard-Core Pornography, Federal Standards Are Also Drawn in Issue.

When Congress exercises a granted power, the federal legislation may displace state law under the Supremacy Clause. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed.23 (1824). Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-230, 11 L.Ed. 1447, 67 S.Ct. 1146, 1151, 1152 (1947). In a situation such as this, where the federal statutes clearly point to a total restraint, the federal compact must be given recognition. Federal preemption as to the category "hard-core" pornography is clearly in order.

While Congress has never established a federal definition of obscenity, it has not, as noted above, been silent about whether or not obscenity should be proscribed. In its

most recent Act of October 3, 1967, Public Law 90-100 81 Stat. 253 (creating the Commission on Obscenity and Pornography) Congress specifically held that the traffic in obscenity and pornography is a matter of national concern. See Section 1 of Public Law 90-100 which provided:

> "Section 1. Finding of fact and declaration of policy. - The Congress finds that the traffic in obscenity and pornography is a matter of national concern. The problem, however, is not one which can be solved at any one level of government. The Federal Government has a responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials. The State and local governments have an equal responsibility in the exercise of their regulatory powers and any attempts to control this transmission should be a coordinated effort at the various governmental levels. It is the purpose of this Act to establish an advisory commission whose purpose shall be, after a thorough study which shall include a study of the casual relationship of such materials to antisocial

> behavior, to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic in obscenity and pornography."

See, also, Senate Resolution No. 477, rejecting the findings and recommendations of the Commission on Obscenity and Pornography, which recommended the liberation of obscenity. (Congressional Record for October 13, 1970, at pages 36474-36478.) The most logical solution to this federal definitional problem and the concomitant problem of defining the overall federal responsibility in the obscenity area lies in Justice Harlan's views of the category of obscenity, "hard-core pornography", and federal power in relation thereto, cited with approval in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607.

In Smith v. U. S., ___ U.S. ___, 52 L.Ed.2d 324, 97 S.Ct. ___ (May 23, 1977), Justice Blackmun, speaking for a majority of this Court, restated the following basic principles in the federal area of obscenity:

> "1. the regulation of 'obscenity' is a matter of particular federal concern;
>
> 2. federal as well as state interests are concerned; and
>
> 3. where a conflict exists, the

principles of federal supremacy must prevail." 11/

11/ See Smith v. U. S., ___ U.S. ___, 52 L.Ed.2d 324 at page 337, footnote 10:

"The language of 1461 gives no indication that Congress intended to adopt state laws relating to distribution of obscene material for purposes of the federal statute, nor does its history. See n 12, infra. Furthermore, none of the usual reasons advanced in favor of such adoption are present here. The regulation of the mails is a matter of particular federal concern, and the nationwide character of the postal system argues in favor of a nationally uniform construction of §1461. The Constitution itself recognizes this fact, in the specific grant to Congress of power over the postal system. Art I, §8, cl 7. Obscenity in general has been a matter of both national and local concern. To the extent that local concern is relevant, however, the jurors' application of contemporary community standards fully satisfies that interest. Finally, to the extent that the state law and the federal law conflict, traditional principles of federal supremacy require us to follow the federal policy. See Clearfield Trust Co. v. United States, 318 U.S. 363, 87 L.Ed. 838, 63 S.Ct. 573 (1943); United States v. Standard Oil Co., 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604 (1947); DeSylva v. Ballentine, 351 U.S. 570, 100 L.Ed. 1415, 76 S.Ct. 974 (1956); United States v. Little Lake Misere Land Co., 412 U.S. 580, 37 L.Ed. 2d 187, 93 S.Ct. 2389 (1973). See generally Comment, Adopting State Law as the Federal Rule of Decision: A Proposed Test, 43 U.Chi. L.Rev. 823 (1976). We therefore decline petitioner's invitation to adopt state law relating to distribution for purposes of the federal statute regulating use of the mails."

Although the issue as framed by petitioners in Question 3 may technically be resolved without considering federal standards, as by a simple reply that the film is not protected by the First and Fourteenth Amendments, this Court should not consider the question to be so limited. While such a determination would not present a federal conflict and would avoid an application of federal standards, it would also permit the petitioner to continue making indirect challenges to the federal obscenity laws without suffering any consequences. Amicus submits that this Court, in recognition of its broad responsibility for the effective administration and execution of the federal obscenity laws noted above, should treat Question 3 as presenting the broader question, that is, whether the film "Behind The Green Door" is also obscene under federal standards. In this regard, the Court should treat the scope of the petition as being coextensive with the Petitioner's own request at page 19 of his Brief, reading:

> "The Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscerity vel non of the nationally acclaimed motion picture film "Behind the Green Door" upon which Petitioner's conviction rests."

C. Having Specifically Defined the Standards of This Nation In Miller v. California and Its Companion Cases, This Court Should Now Apply Those Federal Standards In a Way Which Will Be Meaningful.

In his Brief at page 20, Petitioner requests the majority of this Court to reconsider the "landmark decisions in Miller v. California, 413 U.S. 15 (1972) and its companion cases." Amicus submits that Petitioner has given no valid reason for reconsidering the principles set forth in those cases. As recently as March 1, 1977, this Court reaffirmed the existence of those federal standards in Marks v. U.S., ___ U.S. ___, 51 L. Ed.2d 260, 264, 97 S.Ct. ___ (Mar. 1, 1977), where it said at page 263:

> ". . . on June 21, 1973, this Court decided Miller v. California, supra, and its companion cases. Miller announced new standards for 'isolating "hard-core" pornography from expression protected by the First Amendment.' 413 U.S., at 29, 37 L.Ed.2d 419, 93 S.Ct. 2607. That these new standards would also guide the future interpretation of the federal obscenity laws was clear from United States v. 12 200-foot Reels of Film, 413 U.S. 123, 129-130, an n7, 37 L.Ed.2d 500, 93 S.Ct. 2665 (1973), decided the same day as Miller. See Hamling v. United States, 418 U.S., at 105, 113-114, 41 L.Ed.2d 590, 94 S.Ct. 2887."

Having specifically defined the standards of this

nation over four years ago, this Court should now apply those federal standards in a meaningful manner which will shed some light as to what those abstract standards mean, in terms of the law and the moral values of this nation as a whole.

Clearly, the motion picture film "Behind the Green Door" constitutes subject matter which is proscribed and declared illegal (contraband) under the federal test articulated by this Court in Miller v. California and its companion cases. Such subject matter (1) taken as a whole, appeals to a prurient interest in sex, (2) portrays in a patently offensive way sexual conduct specifically defined by law, and (3) taken as a whole, does not have serious literary, political, social, artistic, or scientific value.

For purposes of "instant" analysis, Amicus has attached to this brief at Appendix "D" and Appendix "E", an accurate "Continuity" [12/] and

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12/ The "continuity" is an accurate reproduction of the sound portion of the film, identifying the actors, their roles and what they say as the film progresses. Visual screen depictions are recorded by still camera photographs reproduced at the exact point in the dialogue where such images appear, creating a miniture screen effect. The story line is timed from beginning to end to identify those scenes in point of time.

"Time and Motion Study" [13] of the film, "Behind the Green Door". The sexual conduct which is portrayed in a patently offensive way, and which offends the above stated federal standards, is set forth below, with appropriate references to where such explicit sexual conduct appears in the Time and Motion Study (Appendix "E") for the film "Behind the Green Door."

(a) Lesbianism - Woman stimulating sexual response in another woman (Exhibit E, photos 79-93);

(b) Lesbianism - Cunnilingus, female on female (Exhibit E, photos 140-228);

(c) Lesbianism. Group of females sexually arousing single naked female (Exhibit E, photos 164-166);

(d) Lesbianism - female mouth to mouth embrace (Exhibit E, photos 230-233);

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[13] The "time and motion study" consists of a chronological series of photographs timed in their relative order of appearance, depicting fairly and accurately the sexual conduct visually portrayed on the motion picture screen by such film. The "time and motion study" which appears at Appendix "E" is a 4-1 photographic reduction of the original time and motion study (which is much clearer in detail) being lodged with the clerk of this Court concurrently with the filing of this amicus curiae brief.

(e) Lewd exhibition of genitals. Black man enters with erection, walks around stage (Exhibit E, photos 240-253);

(f) Cunnilingus, male on female (Exhibit E, photos 254-276);

(g) Sexual intercourse, male on female (Exhibit E, photos 280-369);

(h) Oral sodomy by female on male (Exhibit E, photos 392-393);

(i) Masturbation; female on two males at once (Exhibit E, photos 396-403);

(j) Fellatio - female on male (Exhibit E, photos 406-421);

(k) Masturbation - female on male (Exhibit E, photos 425-426);

(l) Fellatio - female on male (Exhibit E, 433-434);

(m) Sexual intercourse (Exhibit E, photos 435-437);

(n) Cunnilingus - female on female, lesbianism (Exhibit E, photos 481-486);

(o) Masturbation - male onlooker self-masturbation (Exhibit E, photos 495);

(p) Cunnilingus - male on female (Exhibit E, photos 505-520);

(q) Masturbation - female on male (Exhibit E, photos 521-526);

(r) Cunnilingus - male on female

(Exhibit E, photos 527-536);

(s) Oral copulation and cunnilingus in orgy setting (Exhibit E, photos 527-538);

(t) Fellatio - female on male (Exhibit E, photos 539-544);

(u) Cunnilingus and fellatio (Exhibit E, photos 545-550);

(v) Cunnilingus - group sex, orgy setting (Exhibit E, photos 551-562);

(w) Lesbianism - women mouth to mouth (Exhibit E, photos 563);

(x) Fellatio - female on male (Exhibit E, photos 564);

(y) Sexual intercourse (Exhibit E, photos 565-578);

(z) Masturbation - male on female (Exhibit E, photos 579-610);

(aa) Fellatio - female on reclining male (Exhibit E, photos 611-616);

(bb) Anal sodomy (Exhibit E, Photo 617);

(cc) Lesbianism - cunnilingus (Exhibit E, photo 618);

(dd) Lesbianism - mouth to mouth (Exhibit E, photos 633-634);

(ee) Sexual intercourse (Exhibit E, photo 640);

(ff) Oral copulation simultaneous with dual masturbation, performed by the same

female while having sexual intercourse at the same time (Exhibit E, photos 641-666);

(gg) Emission, after withdrawal from sexual intercourse, showing explicit graphic ejaculation in slow motion. (Exhibit E, photos 667-794);

(hh) Fellatio - female on male (Exhibit E, photos 811-849);

(ii) Cunnilingus - male on female (Exhibit E, photos 850-870);

(jj) Sexual intercourse (Exhibit E, photos 871-997);

(kk) Series of flashbacks on all sexual acts while credits are displayed (Exhibit E, photos 998-1041).

Petitioner's irresponsible claim to this Court that the subject matter described above is a "nationally acclaimed motion picture film", see Brief for Petitioner at page 19, explains the frustration felt by law enforcement officials today as they view the courtroom scene. What is needed, at the present time, is an acknowledgment that "common sense" still prevails, and an exercise of the type of judgment immortalized by Hans Christian Anderson in his fable "The Emperor's New Clothes." The relevancy of Anderson's "fairy tale" reference is commented on by Justice Potter in his opinion

in the Ohio Court of Appeals in Ohio ex rel Ewing v. "Without a Stitch", 276 N.E.2d 655, 658 (July 9, 1971), affirmed in Ohio ex rel Ewing v. "Without a Stitch", 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974). Appeal dismissed for want of a substantial federal question in Art Theater Guild, Inc. v. Ewing, 421 U.S. 923, 44 L. Ed.2d 82, 95 S.Ct. 1649 (Apr. 21, 1975).[14/]

It would appear from the evidence that "Behind the Green Door" is the type of autoptical "hard-core" material which Justice Stewart has talked about for years. See his concurring opinion in Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed. 2d 791, 804, 84 S.Ct. 1676 (June 22, 1964), where he stated, "But I know it when I see it. . . "

D. The Views Against Obscenity Prosecutions Which Justices Brennan, Stewart and Marshall Currently Espouse, Run Contrary To The Nature of Man and, in the Words of Alexander Pope, "Embrace" the Monster Vice.

In addressing himself to this subject in U.S. v. Four (4) Books, 289 F.Supp. 972, 973 (Sept. 10, 1968), U.S. District Court Judge Peirson Hall, opened his remarks with a reference to the observations of Alexander Pope, written

14/ See a reproduction of "The Emperor's New Clothes", printed in Denmark by Fyens Stiftsbogtrykkeri, Odense at Appendix "F."

over 200 years before in his "Essay on Man". Judge Hall's remarks on the performance of the plurality of this modern court from Roth in 1957 to Redrup in 1967, made just five years before this Court's majority opinion in the Miller decision, were:

> "Vice is a monster of so vile a mien,
> As, to be hated, needs but to be seen;
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace."
>
> "The verity of the above quotation is brought home not only by the continually increasing number of periodicals, paperbacks and other printed material glorifying things which most people regard as indecent or obscene, which flood newsstands and bookracks, but also, to anyone who has read them, by the recent journeys of the Supreme Court of the United States on the question of 'obscenity.'"

The suggestion made by Petitioner that the conduct described herein should be legalized because such cases "place an incredible strain upon the rare resources of judicial time and energies" (Brief for Petitioner at page 21), and "the widespread concern over our presently overworked judiciary" (Brief for Petitioner, at page 22), and "with a view toward alleviating the present institutional strain upon the judiciary and with the further view of reaffirming that 'article of faith that sets us apart from most nations

in the world'" is nothing less than a bold argument that, because we have "seen", "hated", "familiarized ourself with", and "endured" the Monster Vice, we should now take "pity" and "embrace" it.

The same or similar arguments were made and rejected by a clear majority of this Court in the Miller decisions. See the separate opinion of Justice Stevens, concurring in the denial of certiorari in Liles and Bremner v. Oregon, ___ U.S. ___, 48 L.Ed.2d 209, ___ S.Ct. ____ (May 3, 1976). While a new majority of this Court has been formed which, hopefully, may be able to restore some lawful order to what had been regarded as a hopeless "court" situation, the fact that Petitioner herein has been able to gain support from Justice Steven's recent arrival on the bench in 1975 (See Brief for Petitioner at page 22) requires some renewed effort to fix the responsibility of the remaining dissenting members for the unsatisfactory conditions which presently exist.[15/]

[15/] For a more comprehensive statement on the responsibility of the plurality of this Court for the proliferation of hard-core pornography based upon its decisions prior to June of 1973, see Motion of Charles H. Keating Jr. For Leave To File A Brief Amicus Curiae in Support of Respondent in Heller v. New York, filed in No. 71-1043 at pp. 1-19.

There is an extraordinary amount of hard evidence, which the members of this Court cannot fail to take note of, that this country is "in extremes", in relation to its public morals and enforcement of the criminal laws. That condition did not exist ten years ago. For example, at the time of the power failure in New York City in November of 1965, no public looting occurred. In contrast, when a lesser power failure of 25 hours occurred in July of 1977, the amount of public looting became a matter of international notoriety. 3481 persons were arrested for looting and 900 blazes occurred, of which 60% were attributable to arson. Other factors may be mentioned, such as the hot month of July, but the fact remains that people are conscious that something startling has taken place -- and within the past 10 years. It is in this general context that the growth in pornography must be considered.

In 1964, when Justice Brennan's plurality opinion was announced in Ohio v. Jacobellis and became the controlling precedent, there was little hard-core pornography on the black market. Its potential presence on the public screen was then unthinkable. Less than 13 years later, under the dominating opinions of Justice Brennan and other individual justices of that plurality court, the public screens and neighborhoods are

now overrun with such materials. Even worse, they have found their way into cheap video tape reproduction and are presently being marketed for private T.V. consumption in the homes of those neighborhoods. Similarly, in the year 1964, there was little public evidence of any widespread sexual molestation of children, and none in relation to the production of pornography. In the year 1977, the extent of "child pornography" is a matter of public disgrace (see Time Magazine dated April 4, 1977 at page 55). Those members of this Court who can see no connection at all between the growth of pornography and the introduction of "child pornography" on the American scene are closing their eyes to the obvious. Had the operations of the major dealers in obscenity, Edward Mishkin, Edmund Leja and Milton Luros, all well-known to this Court, been properly limited by responsible decisions from this Court during that period, there would have been no "markets" today for such an expansion of obscenity into the "child pornography" area. Given the irresponsible decisions of this Court prior to 1973, it was as certain "as God made little apples" that the above-mentioned dealers and others like them would expand their operations into child pornography, which, in fact, they did do. See New York News article dated April 11, 1977 entitled

"King Smut's Tomb Is A Week End Call on Rikers" and the Los Angeles news article dated May 26, 1977 entitled "Thousands of Boys, Girls, Some as Young as 3, Are Used In Sex Magazines, Films." Sadly, it is also true that, except for this Court's pre-1973 decisions on obscenity, there would be no child pornography today, nor would there be any child victims to that trade.

Amicus submits that Justice Stevens' statement in his separate opinion in Smith v. U.S., ___ U.S. ___, 52 L.Ed.2d 324 at 342, ___ S.Ct. ___, that he believes that "criminal prosecutions are an unacceptable method of abating a public nuisance which is entitled to at least a modicum of First Amendment protection" does not give proper consideration to Alexander Pope's warning on the nature of man, and what the decisions of this Court have wrought in the past 20 years.[16/]

[16/] Justice Stevens might weigh in the balance what would be the effect upon the lawless element of law enforcement if those persons were instructed that stag films were legal and that it would be fitting and proper to run "stag parties" for the benefit of its members. The newspapers today are filled with news events of judges, prosecutors and police administrators who are on the "take." Would such a rule of law affect their general performance? Alexander Pope and this Amicus say it would. While it is true that crime statistics and the Court's workload may be lowered by making such conduct legal, this is not a proper

If Justice Stevens is willing to accept this Court's pre-1973 performance and the resulting consequences which exist today, and join Justices Brennan, Stewart and Marshall in perpetualizing all they have done and said in their pre-1973 opinions, then surely his opinion in Smith must also be read as expressing a willingness to accept and embrace the Monster Vice.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Dated: July 18, 1977.

Respectfully submitted,

Charles H. Keating, Jr.
919 Provident Tower
Cincinnati, Ohio

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, California

Counsel for Citizens for
Decency Through Law, Inc.

rationale for establishing mandatory rules at the level of the highest court in the land, where one error is fatal to all of the laboratories. Compare Justice Harlan's dissenting opinion in Jacobellis v. Ohio, 378 U.S. 184, 204, 12 L.Ed.2d 793, 807, 84 S.Ct. 1673.

CERTIFICATE OF SERVICE

I, hereby certify that on this 19th day of July, 1977, copies of the within Brief Amicus Curiae of Citizens for Decency Through Law, Inc., an Ohio Corporation, in Support of Respondent State of Georgia were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

Robert Eugene Smith
1409 Peachtree Street. N.E.
Atlanta, Ga 30309
Attorney for Petitioner (3 copies)

Leonard W. Rhodes
Room 53, Civil-Criminal Court Bldg.
160 Pryor Street
Atlanta, Ga 30303
Counsel for Respondent (3 copies)

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, California

Counsel for Citizens for
Decency Through Law, Inc.

APPENDIX A

C. D. BALLEW v. The STATE.
No. 51795.

Court of Appeals of Georgia,
Division No. 3.

April 6, 1976.
Rehearing Denied May 6, 1976.

WEBB, Judge.

Claude Ballew appeals his conviction on two counts of distributing obscene materials in violation of Criminal Code § 26-2101. The conviction involved the exhibitions on November 9 and 26, 1973 at an Atlanta theatre of motion picture films entitled "Behind the Green Door." Ballew enumerates thirteen alleged errors, consolidated on argument into six issues.

The first is that the film is not obscene under applicable constitutional law. We were requested to make an independent appellate review of the film and make our own determination of obscenity vel non.

Our Constitution provides that both of our appellate courts are "for the trial and correction of errors of law . . ." Art. VI, Sec. II, Pars. IV and VIII (Code Ann. §§2-3704, 3708). There

is no constitutional provision for an independent appellate determination of the weight of evidence, and it seems to have been well settled that the appellate court's review as to evidence is limited to its legal sufficiency, not its weight. Proctor v. State, 235 Ga. 720, 721, 221 S.E.2d 556; Ridley v. State, 236 Ga. 147, 223 S.E.2d 131. Even so, our Supreme Court has made de novo independent reviews of movie films to decide the constitutional fact of obscenity without reference to the "trial and correction of errors of law" constitutional limitation. Slaton v. Paris Adult Theatre I, 231 Ga. 312, 318, 201 S.E.2d 456; 413 U.S. 49, 93 S.Ct. 2628, 37 L. Ed.2d 446; Dyke v. State, 232 Ga. 817, 209 S.E. 2d 166 (cert. denied by U.S. Supreme Court April 28, 1975, 421 U.S. 952, 95 S.Ct. 1687, 44 L.Ed. 2d 106).

Our view has been that we are limited to a determination of whether there was sufficient evidence to support the jury's verdict. The Supreme Court of the United States held, however, that on appeal in an obscenity case the appellate court cannot merely decide whether there was sufficient evidence to support a finding by the jury that the material is obscene, but must review independently the constitutional fact of obscenity and make a determination of such vel

non. Miller v. California, 413 U.S. 15, 25, 93 S.Ct. 2607, 37 L.Ed.2d 419; Jenkins v. Georgia, 418 U.S. 153, 160(6), 164, 94 S.Ct. 2750, 41 L.Ed.2d 642, 650, 652. That court held that juries do not have unbridled discretion in determining what is patently offensive, and the jury's verdict does not preclude all further appellate review of an accused's assertion that his film was protected by the First and Fourteenth Amendments.

This issue of independent review had been invoked earlier in Jacobellis v. Ohio, 378 U.S. 184, 188, 84 S.Ct. 1676, 1678, 12 L.Ed. 2d 793, 798, wherein Mr. Justice Brennan stated: "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. (Cit.) Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.'"

Mr. Justice Brennan also said that failure to independently review would be "an abnegation of judicial supervision . . . inconsistent with our duty to uphold the constitutional guarantee."

Our own Supreme Court stated in Dyke v.

State, 232 Ga. 817, 821, 209 S.E.2d 166, 169, supra: "We are not bound to approve the jury's finding that this film is obscene, since it is clear the United States Supreme Court has determined that an independent appellate review must be made of the material to decide the constitutional fact of obscenity."

Our duty to uphold the constitutional guarantees is no less than that of the justices of the respective supreme courts of the United States and of this State, and although we abhor even the suggestion of censorship we nevertheless viewed an exhibition of this film in its entirety. Our purpose was two-fold: to determine if there was sufficient evidence to support the verdict; and, in accordance with the decisions of those courts cited hereinabove (which in our opinion exceed our constitutional appellate review limitation), to decide by an independent appellate review the constitutional fact of obscenity vel non."There comes a point where this Court should not be ignorant as judges of what we know as men."[1]

[1] Mr. Justice Frankfurter in Watts v. Indiana, 338 U.S. 49, 52, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801, 1805. See Byrom v. Felker, 137 Ga.App. 400, 224 S.E.2d 72.

Section 26-2101(b) of the Criminal Code in effect at the time of the violations[2] provided: "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

The film, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest. It is without redeeming social value, and it is a shameful and morbid exhibition of nudity with particular and all-encompassing emphasis on sexual acts. It goes substantially beyond customary limits of candor in representing and portraying nudity and sex. The film presents patently offensive exhibitions and representations of ultimate sexual acts and manipulations, normal and perverted. It shows unabashedly offensive and lewd views of the genitals of both male and female participants, and is replete with portrayals of individual and group acts

[2] The law was amended in 1975 and broadens somewhat the definition of obscene materials. Ga.L.1975, p. 498.

of masturbation, cunnilingus, fellatio and sexual intercourse. It is degrading to sex. Except for the opening and a few other scenes toward the conclusion, it is rank, hard core pornography, and each exhibition in the theatre was "the public portrayal of hard-core sexual conduct for its own sake, and (presumably) for the ensuing commercial gain." Miller v. California, 413 U.S. 15, 35, 93 S.Ct. 2607, 2621, 37 L.Ed.2d 419, supra. The film "Behind the Green Door" is obscene as a matter of constitutional law and fact, and is unprotected by the First and Fourteenth Amendments. Miller v. California, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419, supra; see also Liles v. Oregon, Or.App., 543 P.2d 698, 44 L.W. 3623 (cert. den. by United States Supreme Court May 3, 1976, __ U.S. __, 96 S.Ct. 1749, 48 L.Ed.2d 209).

Ballew's second contention is that the evidence was insufficient to support the verdict. We do not agree.

The film, obviously, is the best evidence of what it represents, and having been before the trial court no other affirmative evidence is necessary to determine its obscenity vel non. Examining the record and viewing a projection of the film, we conclude that the jury's determination that the picture was obscene was

supported by the evidence. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56, 93 S.Ct. 2628, 37 L.Ed.2d 446, supra; Hamling v. United States, 418 U.S. 87, 100, 94 S.Ct. 2887, 41 L.Ed.2d 590, 610. "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." Miller v. California, 413 U.S. 15, 25, 93 S.Ct. 2607, 2616, 37 L.Ed.2d 419, supra.

Ballew asserts, however, that the evidence was insufficient to connect him, beyond a reasonable doubt, with the exhibition of this film, "Behind the Green Door." The theatre he managed was an "adult" theatre, and the film was advertised on the marquee. He was present when the film was exhibited on the dates of his arrest. On at least one of the occasions involved herein he sold tickets, and pressed a button to allow entrance into the seating area. He checked the cash register and locked the door after each arrest.

In Dyke v. State, 232 Ga. 817, 822, 209 S.E.2d 166, 170, supra, "Appellant further argues the evidence is legally insufficient to sustain his conviction for exhibition of this film because it failed to show he had

control over the showing of the film or knowledge of its content. The evidence shows that the film was advertised on the marquee of the theatre managed by appellant and that the theatre was an 'adult theatre.' Appellant was shown to be on the premises when the film was exhibited on the two separate dates charged in the accusation and, on the second occasion, appellant sold tickets for admission to see it. This was sufficient to authorize the jury to conclude that on each occasion appellant at least aided and abetted in the exhibition of the film. See Code Ann. § 26-801."

We also reject Ballew's assertion that the evidence failed to prove guilty knowledge by him of the nature of the film. Under Criminal Code § 26-2101(a) "knowing" as used therein "shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." See Dyke v. State, p. 822, 209 S.E.2d 166, and cits.

The next argument is that the trial judge improperly instructed the jury as to the law so as to deny him his constitutional rights

guaranteed by the First, Fifth and Fourteenth Amendments. An examination of the various charges complained of, however, reveals that they as a whole comport with Criminal Code § 26-2101, and those approved in Dyke v. State, 232 Ga. 817, 209 S.E.2d 166, supra, and Slaton v. Paris Adult Theatre I, 231 Ga. 312, 201 S.E. 2d 456, supra. One charge complained of was a quotation of the definition of obscene material as set forth in § 26-2101. There is no merit in this complaint.

Error is charged on the Court's denial of Ballew's motion to suppress the motion picture film because the search warrants were issued upon affidavits allegedly insufficient to supply probable cause. This same contention was made in Dyke v. State, 232 Ga. 817, 823, 824, 209 S.E.2d 166, supra. The affidavits upon which the two search warrants were issued herein contain rather accurate and full factual descriptions of representative scenes on the film, and were sufficient to show probable cause for issuance of the warrants.

Ballew contends his conviction on two counts in the accusation were but a single transaction and his conviction thereon violated his constitutional rights against double jeopardy as guaranteed by the Fifth Amendment and the Georgia

Constitution. Interestingly, this same argument was made in Dyke v. State, 232 Ga. 817, 827, 209 S.E.2d 166, supra, counsel for Ballew having been counsel for Dyke.

Here, the accused was first arrested for showing the film on November 9, and the film was seized under the search warrant. The accused waived commitment hearing. Subsequently, the accused was arrested on another warrant for showing the same picture, from another copy of the film, on November 26. The statement of Justice Ingram in the Dyke case (232 Ga. 827, 828, 209 S.E.2d 166, 173) is equally applicable here. "Appellant argues that the accusation charged him in two counts of violating the same statute and that the proof involved a regularly scheduled showing of a motion picture in a theatre with no disruption in scheduling. The exhibition of the film on two separate dates, appellant argues, does not permit the state to 'pyramid' the charges and punishment against him . . . but that is not the case here. There were two distinct episodes involving different dates of exhibition and even different copies of the same film. This record shows two criminal violations, not a single crime." So it is in this case.

Lastly, appellant complains that he was

denied his right to jury trial under the Sixth and Fourteenth Amendments by being tried before a five-person jury in the Criminal Court of Fulton County.

This contention was ruled upon in Sanders v. State, 234 Ga. 586, 216 S.E.2d 838 (cert. denied by U.S. Supreme Court Feb. 23, 1976, ___ U.S. ___, 96 S.Ct. 1145, 47 L.Ed.2d340) wherein the Supreme Court said: "We reject this argument in view of Georgia authority to the contrary. See McIntyre v. State, 190 Ga. 872(5), 11 S.E.2d 5. The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a 'jury.' In Williams v. Florida, 399 U.S. 78, 92(Fn.28), 90 S.Ct. 1893, 1901, 26 L.Ed.2d 446, it is observed: 'We have no occasion in this case to determine what minimum number can still constitute a "jury," but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional mimimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts."

We find no error and affirm the trial court.

Judgment affirmed.

DEEN, P.J., and QUILLIAN, J., concur.

GEORGIA COURT OF APPEALS
DENIAL OF REHEARING

GEORGIA COURT OF APPEALS

May 6, 1976

51795. BALLEW (C.D.) V. THE STATE W-33

Please substitute the attached new page 7 for that previously furnished in the opinion rendered in the above case on April 6, 1976. The judgement is not affected and the motion for rehearing is denied.

GEORGIA SUPREME COURT
DENIAL OF WRIT OF CERTIORARI

CLERKS' OFFICE, SUPREME COURT OF GEORGIA

Atlanta July 9, 1976

Dear Sir:

Case No. 31362 *Claude Davis Ballew v. The State*

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS.
Clerk

APPENDIX B

Reference: Amicus Curiae Brief at pages 4 and 5.

Copyright Office of the United States of America

THE LIBRARY OF CONGRESS

WASHINGTON

THIS IS TO CERTIFY THAT THE ATTACHED IS A TRUE COPY OF THE APPLICATION ON FILE IN THE COPYRIGHT OFFICE UNDER REGISTRATION NUMBER Mp. 24594 OF THE YEAR 1973.

IN TESTIMONY WHEREOF, THE SEAL OF THIS OFFICE IS AFFIXED HERETO ON March 12, 1974

Barbara Ringer

REGISTER OF COPYRIGHTS

Page 1

Application
for Registration of a Claim to Copyright in a motion picture

FORM L-M

REGISTRATION NO. MP 24594

DO NOT WRITE HERE

CLASSES **L-M**

Instructions: Make sure that all applicable spaces have been completed before you submit the form. The application must be **SIGNED** at line 10. For published works the application should not be submitted until after the date of publication given in line 5 (a), and should state the facts which existed on that date. For further information, see page 4.

Pages 1 and 2 should be typewritten or printed with pen and ink. Pages 3 and 4 should contain exactly the same information as pages 1 and 2, but may be carbon copies.

Mail all pages of the application to the Register of Copyrights, Library of Congress, Washington, D.C. 20540, together with:

(a) If unpublished, title and description, prints as described on page 4, and the registration fee of $6.

(b) If published, two complete copies, description, and the registration fee of $6.

Make your remittance payable to the Register of Copyrights.

1. Copyright Claimant(s) and Address(es): Give the name(s) and address(es) of the copyright owner(s). For published works the name(s) should ordinarily be the same as in the notice of copyright on the copies.

Name: JARTECH, INC.

Address: 1204 Fox Plaza, San Francisco, California 94102

Name: ______

Address: ______

2. (a) Title: "BEHIND THE GREEN DOOR"
(Give the title of this particular motion picture as it appears on the copies)

(b) Series Title: ______
(If work is part of a series with a continuing title, also give series title)

3. (a) Nature of Work: (One of the following boxes MUST be checked. *For further information, see page 4.*)

☐ Class L—Photoplay

☒ Class M—Motion picture other than a photoplay

(b) Running time or footage: 72 minutes

4. Author: Citizenship and domicile information must be given. Where a work is made for hire, the employer is the author. The citizenship of organizations formed under U.S. Federal or State law should be stated as U.S.A. If the copyright claim is based on new matter (see line 6) give information about the author of new matter.

Name: JARTECH, INC. Citizenship: U.S.A. (Name of country)

Domiciled in U.S.A. Yes X No ___ Address: 1204 Fox Plaza, San Francisco, Ca., 94102

NOTE: Leave all spaces of line 5 blank unless your work has been PUBLISHED.

5. (a) Date of Publication: Give the complete date when copies of this particular work were first placed on sale, sold, or publicly distributed. The date when the motion picture was made or exhibited should not be confused with the date of publication. (See page 4.) NOTE: The full date (month, day, and year) must be given.

April (Month) 19 (Day) 1973 (Year)

(b) Place of Publication: Give the name of the country in which this particular motion picture was first published.

______

NOTE: Leave all spaces of line 6 blank unless the instructions below apply to your work.

6. Previous Registration or Publication: If a claim to copyright in any substantial part of this work was previously registered in the U.S. Copyright Office in unpublished form, or if a substantial part of the work was previously published anywhere, give requested information.

Was work previously registered? Yes ___ No X Date of registration ______ Registration number ______

Was work previously published? Yes ___ No X Date of publication ______ Registration number ______

Is there any substantial **NEW MATTER** in this version? Yes ___ No ___ If your answer is "Yes," give a brief general statement of the nature of the **NEW MATTER** in this version. (New matter may consist of compilation, abridgment, editorial revision, and the like, as well as additional cinematographic work.)

EXAMINER: BD

Complete all applicable spaces on next page and SIGN on line 10.

7. If registration fee is to be charged to a deposit account established in the Copyright Office, give name of account:

______

8. Name and address of person or organization to whom correspondence or refund, if any, should be sent:

Name: JARTECH, INC. Address: 1204 Fox Plaza, San Francisco, Ca.

9. Send certificate to:

(Type or print name and address)

Name: JARTECH, INC.

Address: 1204 Fox Plaza (Number and street)

San Francisco, California 94102 (City) (State) (ZIP code)

10. Certification: I CERTIFY that the statements made by me in this application are correct to the best of my knowledge.

(Application not acceptable unless signed)

X [signature] Pres., Jartech, Inc.
James E. Mitchell (Signature of copyright claimant or duly authorized agent)

Application Forms

Copies of the following forms will be supplied by the Copyright Office without charge upon request.

Class A Form A—Published book manufactured in the United States of America.

Class A or B: Form A-B Foreign—Book or periodical manufactured outside the United States of America (except works subject to the ad interim provisions of the copyright law). Form A-B Ad Interim—Book or periodical in the English language manufactured and first published outside the United States of America.

Class B: Form B—Periodical manufactured in the United States of America. Form BB—Contribution to a periodical manufactured in the United States of America.

Class C Form C—Lecture or similar production prepared for oral delivery.

Class D Form D—Dramatic or dramatico-musical composition.

Class E: Form E—Musical composition the author of which is a citizen or domiciliary of the United States of America or which was first published in the United States of America. Form E Foreign—Musical composition the author of which is not a citizen or domiciliary of the United States of America and which was not first published in the United States of America.

Class F Form F—Map.

Class G Form G—Work of art or a model or design for a work of art.

Class H Form H—Reproduction of a work of art.

Class I Form I—Drawing or plastic work of a scientific or technical character.

Class J Form J—Photograph.

Class K: Form K—Print or pictorial illustration. Form KK—Print or label used for an article of merchandise.

Class L or M: Form L-M—Motion picture.

Class N Form N—Sound recordings.

Form R—Renewal copyright.

Form U—Notice of use of copyrighted music on mechanical instruments.

FOR COPYRIGHT OFFICE USE ONLY

Application received: NOV - 8 1973	Priority received:	One copy received:
Two copies received: 19 NOV 1973		
Title and description received: 23 NOV 1973	...ed by C.O. from cert (apol)	
Fee received: 93183 NOV 8 73		
Remarks:		

BEST COPY AVAILABLE

Page 3

Not Official Certificate (17 U.S.C. 215)

Certificate

Registration of a Claim to Copyright in a motion picture

FORM L-M

REGISTRATION NO. Mp 24594

DO NOT WRITE HERE

CLASSES L-M

This is To Certify that the statements set forth on this certificate have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Barbara Ringer

Register of Copyrights, United States of America

1. Copyright Claimant(s) and Address(es):

Name JARTECH, INC.

Address 1204 Fox Plaza, San Francisco, California 94102

Name

Address

2. (a) Title: "BEHIND THE GREEN DOOR"
(Give the title of the particular motion picture as it appears on the copies)

(b) Series Title:
(If work is part of a series with a continuing title, give series title)

3. (a) Nature of Work

☐ Class L—Photoplay ☒ Class M—Motion picture other than a photoplay

(b) Running time or footage: 72 minutes

4. Author

Name JARTECH, INC. Citizenship U.S.A.
(Name of country)

Domiciled in U.S.A. Yes X No ___ Address 1204 Fox Plaza, San Francisco, Ca., 94102

5. (a) Date of Publication:

April 18 1973
(Month) (Day) (Year)

(b) Place of Publication:

U.S.A.
(Name of country)

6. Previous Registration or Publication:

Was work previously registered? Yes ___ No X Date of registration ___ Registration number ___

Was work previously published? Yes ___ No X Date of publication ___ Registration number ___

Is there any substantial NEW MATTER in this version? Yes ___ No ___ If your answer is "Yes," give a brief general statement of the nature of the NEW MATTER in this version:

EXAMINED

Complete all applicable spaces on next page.

7. Deposit account:

8. Send correspondence to:
Name JARTECH, INC. Address 1204 Fox Plaza, San Francisco, Ca.

9. Send certificate to:

(Type or print name and address)

Name JARTECH, INC.

Address 1204 Fox Plaza
(Number and street)

San Francisco, California 94102
(City) (State) (ZIP code)

Information concerning copyright in motion pictures

When to Use Form L-M. Form L-M is appropriate for unpublished and published motion pictures which are complete and ready for projection or broadcast.

What Is a "Motion Picture"? The copyright law provides for two classes of motion pictures.

—*Photoplays* (Class L) include motion pictures that are dramatic in character and tell a connected story, such as feature films, filmed television plays, and animated cartoons.

—*Motion Pictures Other Than Photoplays* (Class M) include such films as documentaries, newsreels, travelogues, promotional films, and filmed television programs having no plot.

Unpublished Screenplays. The Copyright Office cannot make registrations for an unpublished screenplay, synopsis, format, or general description of a motion picture.

No "Blanket" Copyright. The general idea, outline, or title of a motion picture or of a filmed series cannot be copyrighted. Registration for a motion picture covers the copyrightable material in the film, but does not give any sort of "blanket" protection to the characters or situations portrayed, to future films in the series, or to the series as a whole.

Duration of Copyright. Statutory copyright begins on the date the work was first published, or, if the work was registered for copyright in unpublished form, copyright begins on the date of registration. In either case, copyright lasts for 28 years, and may be renewed for a second 28-year term.

Unpublished motion pictures

How to Register a Claim. To obtain copyright registration mail the following material to the Register of Copyrights, Library of Congress, Washington, D.C. 20540: (1) one "print" taken from each scene or act of the work if a photoplay, or at least two "prints" taken from different sections of the film if not a photoplay. These "prints" may be frames or blow-ups of a film, or, if on videotape, snapshots (from a studio monitor); (2) separate cuts and descriptions (synopsis, press book, continuity, etc.); (3) an application on Form L-M, and (4) a fee of $6.

Procedure to Follow if Work Is Later Published. If the work is later reproduced in copies and published, it is necessary to make a second registration, following the procedure outlined below. To maintain copyright protection, all copies of the published work must contain a copyright notice in the required form and position.

Published motion pictures

What Is "Publication"? Publication, generally, means the sale, placing on sale, or public distribution of copies. In the case of a motion picture, it may also include distribution to film exchanges, film distributors, exhibitors, or broadcasters under a lease or similar arrangement.

How to Secure Copyright in a Published Motion Picture:

1. *Produce copies with the copyright notice.*
2. *Publish the work.*
3. *Register the copyright claim* by sending to the Copyright Office: (1) two complete copies of the "best" edition of the motion picture; (2) a separate description (synopsis, press book, continuity, etc.); (3) an application on Form L-M, and, (4) a fee of $6. The best edition of a motion picture is generally the most widely distributed gauge, in color if available. Videotape: In addition to two copies of the videotape the Copyright Office requires a set of photographic reproductions from the tape including: (a) the title, (b) the copyright notice, (c) production, performance, and crossavity credits, and (d) two scenes from different sections of the work.

The Copyright Notice. In order to secure copyright in a published work, it is essential that the statutory copyright notice should appear on all copies at time of first publication. This notice should consist of the word "Copyright," the abbreviation "Copr.," or the symbol ©, accompanied by the name of the copyright owner and the year date of publication. Example: © June One 1972. The copyright notice should be embodied in the motion picture, preferably at or near the title frames, and should be clearly seen when projected or broadcast. Use of the symbol © may result in securing copyright in countries which are parties to the Universal Copyright Convention.

NOTE: If copies are published without the required notice, the right to secure copyright is permanently lost and cannot be restored.

Reserve Deposit Copies. The deposit copies (i.e., films or videotapes) of published motion pictures are subject to selection by the Library of Congress. However, it may be possible to enter into a contract with the Librarian for the return of the copies under certain conditions, and contract forms may be obtained on request. Information regarding the contract may be obtained from the Exchange and Gift Division, Library of Congress, Washington, D.C. 20540.

FOR COPYRIGHT OFFICE USE ONLY

Application received	Fee received	One copy received
NOV. -8 1973		
Two copies received		
19 NOV 1973		
Title and examination received		
23 NOV 1973		
Fee received		
93183 NOV 8 73		

APPENDIX C

U.S. District Court
Northern District of Texas
FILED
September 2, 1976
Joseph McElroy Jr. Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MITCHELL BROTHERS FILM GROUP, ET AL, Plaintiffs	)	Civil Action
v.	)	No. CA-3-74-645-D
CINEMA ADULT THEATRE, ET AL, Defendants	)	

MEMORANDUM OPINION AND ORDER

Mitchell Brothers Film Group (Mitchell Brothers) and Jartech, Inc., (Jartech), plaintiffs, seek injunctive relief and damages against several defendants who allegedly are unlawfully displaying a motion picture film on which plaintiffs claim a copyright. Plaintiffs contend that the movie was produced by Jartech and that Mitchell Brothers is the exclusive distributor of the film under a distributorship agreement. Plaintiffs assert a cause of action based on

a claim of infringement of a copyright they possess on the movie, a claim of unfair competition, and a claim of interference with the contractual relationship between the plaintiffs.

Defendants are the operators of a theatre in Dallas, Texas. Defendants contend that plaintiffs' asserted copyright is not valid because the movie is obscene, it does not bear a proper copyright, the copyright was secured through fraud on the Copyright Office, and the movie was in the public domain prior to issuance of the copyright. Plaintiffs cause of action is founded on the validity of the copyright in question and if it is invalid or otherwise unenforceable then plaintiffs suit must fail. After considering the evidence, stipulations of the parties, briefs and arguments of counsel, the court is of the opinion that the relief sought by plaintiffs should be denied.

Factual Background

In 1972 Jartech produced a movie in California titled "Behind the Green Door." During a part of 1972 the movie was shown to audiences at a theater in San Francisco which was owned by James Mitchell and Artie Mitchell, who are brothers and the principal owners of Jartech and the principals of Mitchell Brothers. The

movie was shown to test its acceptance by the general public. During this showing the movie bore a notation that it was copyrighted although at the time it had not been registered with the Copyright Office. The film used in this showing was a "first answer print" rather than a "release print," which is the type of film print normally utilized after a movie is copyrighted and distributed for general exhibition to the public.

In early 1973 the sound effects and music of the movie were changed. Jartech then registered the movie with the United States Copyright Office. The registration certificate reflects that the movie was published on April 18, 1973. The application for copyright registration describes the film as a motion picture "other than a photoplay," which is a film that has no plot, such as a newsreel, travelogue, promotional film and nature study film, as contrasted to a "photoplay" film, which includes movies that are dramatic and have a plot or tell a story. James Mitchell testified that he viewed the movie "Behind the Green Door" as a documentary, that it educated viewers regarding sex and that it did not have a plot or story. He further testified that viewers of the movie had different reactions as to whether it told

a story or had a plot. For these reasons he caused the movie to be described in the application for copyright as "other than a photoplay."

On February 1, 1973, Jartech and Mitchell Brothers entered into a Distribution agreement whereby Mitchell Brothers was granted the exclusive right to distribute and exhibit "Behind the Green Door." Thereafter Mitchell Brothers licensed the movie for exhibition to the general public at movie houses across the country.

The defendant Kenneth Bora operates the Cinema Adult Theater in Dallas. Bora acquired several copies of the movie in dispute and he commenced exhibiting it at his theater. Bora did not acquire the movie from the plaintiffs nor did he possess it with plaintiffs permission. Plaintiffs advised Bora that the movie he was displaying at his theater was a "pirated" copy and they demanded that he cease exhibiting it. Bora did not do so, however, until after this suit was filed and this court issued an injunction against him. At one time Bora excised explicit sexual scenes in the movie and he then exhibited the movie in this edited form to patrons of his theatre.

The court has viewed the copy of the film the plaintiffs filed with the Copyright Office, a copy of the film that Bora obtained and

exhibited at his theater, and the portions of this movie that Bora excised. The film acquired by Bora bore a copyright but it was dissimilar to the copyright on the plaintiffs' film filed with the Copyright Office. The dominant theme of the movie is the portrayal of various sexual acts by a female person with a multitude of persons, both male and female. The movie portrays the genital parts of both sexes, acts of fellatio and cunnilingus, and seminal fluid.

Defendants Contentions

When the defendants exhibited plaintiffs' movie at their theater they infringed the copyright. Section 1 of the Copyright Act gives the owner of a copyright the exclusive right to print, reprint, publish, copy and vend the copyright work for a term of years. The defendants did not have permission to use or exhibit the movie, and when they projected an image on a screen from the film of the movie they caused a copy of the film to be created and violated the provisions of Section 1. Patterson v. Century Productions, 93 F.2d 489, 493 (2nd Cir. 1937).

Defendants contend, however, that the copyright is invalid because plaintiffs secured it through fraud on the Copyright Office by describ-

ing the movie in the application for registration as "other than photoplay" when in fact it is a dramatic work and has a plot and therefore should have been described as a "photoplay." Defendants further urge that when the movie was exhibited in 1972 in San Francisco it was done without limitation or restriction and that it could not thereafter be registered and copyrighted because it was then in the public domain. Also, defendants contend that the movie failed to contain a proper copyright mark and therefore is not entitled to the protection of the Act. The court is of the opinion that these contentions are without merit and do not invalidate the copyright protection for this movie.

Defendants first contention is that the plaintiffs committed fraud on the Copyright Office. The court is of the opinion that the movie can be described as having no plot or structured story and that the description of the movie by the plaintiffs as "other than photoplay" is not an incorrect classification. Assuming that this description was incorrect, there has been no showing that it was an intentional act on the part of the plaintiffs which was tainted with fraud, or that it was done with the intent to deceive the Copyright Office. Further, Section 5 of the Act calls for the classification of

works and it sets out certain classes and requires that the application for registration specify under which class the work belongs. The last sentence of section 5 states that any error in classification shall not impair the copyright protection afforded by the Act. Thus any misstatement in the application in describing this movie would not be grounds to invalidate the copyright protection that the movie might otherwise enjoy. Peter Pan Fabrics, Inc. v. Dan River Mills, Inc., 295 F.Supp. 1367 (S.D.N.Y. 1969), affirmed 415 F.2d 1007 (2nd Cir. 1969); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947); Tiffany Productions v. Dewing, 50 F.2d 911 (D. Maryland 1931).

Defendants' second contention is that the movie was in the public domain before its registration with the Copyright Office. It is true that the general publication without restriction of a literary or other work with the consent of the creator or proprietor places the work in the public domain and it is not copyrightable. However, a limited or qualified publication of a work by the creator or one acting under him will not prohibit a later copyrighting of such work. Baker v. Selden, 101 U.S. 841 (1879); Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 24 (9th Cir. 1933), cert. dismissed 78 L.Ed. 1507. A

publication or showing of a work with only the right to view or inspect it without more is not necessarily a general publication. Patterson v. Century Productions, supra. Likewise, a limited publication to a select group and for a limited purpose and without the right to reproduce, distribute, or sell the work will not be construed as a general publication abrogating the right to copyright the work at a later time. Williams and Wilkins Co. v. United States, 487 F.2d 1345 (U.S.Ct. of Claims 1973); White v. Kimmell, 193 F.2d 744 (9th Cir. 1952). Nor is an exhibition or showing of a work to get a reaction or opinion a publication that constitutes a dedication to the general public; Key West Hand Print Fabrics, Inc. v. Serbin, Inc., 269 F.Supp. 605, 610 (S.D. Fla. 1966), affirmed 381 F.2d 745 (5th Cir. 1967).

The court is of the opinion that the showing of the movie in 1972 was a restricted or limited showing. This showing was to test the acceptance of the movie by the general public. Further, the movie was not distributed at this time to any other exhibitor nor were any copies of the film sold. As a result of this showing the sound tract and music of the movie were altered. In addition the film that was utilized in this showing was not the permanent type of

film print that is used when a movie is released for general distribution to the public. Although the movie was not registered with the Copyright Office in 1972 and the copyright notice on the movie may not have created any copyright protection in favor of the plaintiffs, it was nevertheless a public expression by the plaintiffs that the exhibition was intended to be limited or restricted. For the foregoing reasons the court is of the opinion that the movie was not in the public domain before its registration with the Copyright Office in 1973 and that the copyright is not invalid for that reason.

The copy of the movie viewed by the court which was filed with the Copyright Office does bear a proper copyright notice and the defendants' third claim that the copyright is invalid because of an improper copyright mark is without merit.

Defendants finally and strenously urge that the movie is obscene and the powers of this court should not be invoked to enforce the copyright protection to which the movie would normally be entitled. In deciding this issue the court must first determine whether obscenity is a valid defense to plaintiffs case, and, if so, what standards should be used in deciding whether the movie is obscene.

Section 8 of Article I of the United States

Constitution empowers Congress "To promote the Progress of Science and Useful Arts." Pursuant thereto Congress enacted the Copyright Act (Title 7 U.S.C.). In Section 4 it is provided that works which are subject to a copyright "shall include all the writings of an author." Except for this language the Act is silent as to works which are subject to registration and copyright. The courts, however, have held that some works are not entitled to copyright protection.

In Mazer v. Stein, 347 U.S. 218 (1954) the Supreme Court held that the Copyright Act was intended to afford those who create a work a valuable protection in the work and at the same time "to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world." The court stated:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "science and useful arts." Sacrificial days devoted to such creative activities deserve rewards commemorative with the service rendered. (347 U.S. at 219)

This was also the rationale of the Supreme Court in Baker v. Selden, supra, when the court refused

to grant copyright protection to a book the object of which was to exhibit and explain a bookkeeping system. The court emphasized that the purpose of the Copyright Act then enacted was the promotion of the sciences and that a work which did not do so was not entitled to copyright protection. In Stone & McCarrick, Inc. v. Dugan Piano Co., 220 F. 837 (5th Cir. 1915), the Fifth Circuit, relying on the doctrine of clean hands, refused to grant copyright protection to materials which were found to be false and fraudulent. 1/

1/ In Belcher v. Tarbox, 486 F.2d 1087 (9th Cir. 1973), the court, with one judge dissenting, refused to follow the Fifth Circuit and held that materials which might be fraudulent or false were still entitled to copyright protection.

Although few in number, and not of very recent vintage, in those cases where obscenity has been raised as a defense, the courts have uniformly recognized that an obscene work will not be afforded copyright protection by the courts. Martinetti v. Maguire, 16 F.Cas. 920 (No. 9173)(C.C.Cal. 1867), Barnes v. Minen, 122 F. 480 (C.C.S.N.Y. 1903); Bullard v. Esper, 72 F.Supp. 548 (N.D.Tex. 1947); Kahn v. Leo Feist, Inc., 70 F.Supp. 450 (S.D.N.Y. 1947);

Broder v. Zeno Mauvis Music Co., 88 F. 74 (C.C. N.D. Cal. 1898); Simonton v. Gordon, 12 F.2d 116 (S.D.N.Y 1925); Cain v. Universal Pictures Co., Inc., 47 F. Supp. 1013 (S.D. Cal. 1942). See, 41 Opinions of the Atty. Gen. No. 73 (1958), 121 USPQ 329 (1959), wherein it is opined that the Registrar of Copyrights, while authorized to deny registration to obscene works as he may to other noncopyrightable works, is "free to decide not to attempt to refuse or deny registration of claims to copyright in works of the nature discussed." Also, writers on the subject agree that obscene or immoral matters are not the subject of copyright protection. I. Nimmer, Copyright (1972), § 36 at 146.28; Rogers, Copyright and Morals, 18 Mich. L. Rev. 390 (1920); Comment, Immorality, Obscenity and the Law of Copyright, 6 S.Dak. L. Rev. 109 (1961); Copyright Protection for Motion Pictures: Limited or Perpetual, American Society of Composers, Authors and Publishers, 1970 Copyright Law Symposium #18, p. 174. The rationale of the decisions is that a court of equity will not lend its support to one with unclean hands and for purposes that are contrary to the public interest. Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 494 (1942).

Literary and other works that contain

references to and explicitly exhibit sexual activities have inundated society in the past few years. One would think that the courts would have been called upon quite frequently in recent times to reexamine the long standing prohibition against granting copyright protection to obscene and immoral works, but such has not been the case. Thus, the judicial rule proscribing protection to an obscene work remains unchallenged and in the opinion of the court should be followed in deciding this case.

Most states have laws making it a crime to display or exhibit obscene materials. The federal government has also condemned the interstate transportation, mailing and importation of obscene works. Thus, the general feeling as reflected in statutory enactments is that obscene matters do not further public welfare or public interest or promote the progress of science or useful arts as called for in the empowering clause of the Constitution. Therefore "Sacrificial days" devoted to the production of works which do not advance the public interest or welfare are not entitled to the rewards provided for in the Copyright Act and to judicial protection.

By granting copyright protection to obscene matters it could be urged that they would not

be so easily copied and thereby disseminated to the general public. More compelling in the court's mind is the argument that in refusing copyright protection the creator would have no guarantee of exclusiveness to his product and the rewards that flow therefrom and this would thereby tend to inhibit the creation of works which are obscene.

Plaintiffs argue that since the movie is registered with the Copyright Office a presumption is created that it is a proper subject for copyright and it cannot be challenged on the grounds that it is an obscene work. The court disagrees. Copyrights and patents are subject to judicial attack. Even assuming that the registration creates some form of presumption in plaintiffs' favor, the presumption imposes on the defendants the burden of going forward with the evidence to rebute the presumption, but there would still be imposed on the plaintiffs the burden of establishing the validity of their copyright. Rule 301, Fed. Rules of Evid.

Having concluded that the movie is not entitled to protection as a copyrighted work if it is obscene, the court must next determine what standards should be applied in deciding whether the movie is obscene. In Miller v. California, 413 U.S. 15 (1973) the Supreme Court recognized that contemporary community standards were to

be applied in testing the obscenity vel non of a material. The testing by community standards was also adhered to in the earlier cases of Memoirs v. Massachusetts, 383 U.S. 413 (1966) and Roth v. United States, 354 U.S. 476 (1957). Thus, in those cases where it has been determined that the First Amendment does not immunize a person from criminal sanctions when dealing with obscene materials, the Supreme Court has ruled that local standards are to be used in determining whether a material is obscene. Therefore, the issue arises here whether a different standard should be applied in adjudicating an obscenity defense to a suit for copyright infringement. The underlying purpose of the Copyright Act is to grant protection throughout the United States, and therefore the Copyright Act is national in scope and application. Goldstein v. California, 412 U.S. 546 (1973). From this premise it is argueable that a national obscenity standard should be applied, otherwise what might be obscene in Dallas and not protected by the Copyright Act might not be obscene in San Francisco and gain the Acts protection.[2/]

[2/] In Cain v. California, supra, in determining whether a copyright encompassed obscene materials the court adopted standards applicable to the federal statute banning obscene materials from

fn. 2 cont.
the mails, 18 U.S.C. §1461. In Bullard v. Esper, supra, the court adopted the standards applicable to the banning of obscene materials from interstate transportation by carriers, 18 U.S.C. §1462. Other courts have adopted different standards. In Kahn v. Leo Feist, Inc., supra, the court in a copyright case examined the work to see if "there was a purpose to corrupt the morals of hearers, or to stimulate thoughts or impulses which would otherwise be dormant." In United States v. One Book Entitled Ulysses, 72 F.2d 705 (2nd Cir. 1934), the court was called upon to determine whether a book was obscene within federal statutes prohibiting importation of obscene materials. The court held that the applicable test was whether the book taken as a whole has a libidinous effect. In Simonton v. Gordon, 12 F.2d 116 (S.D.N.Y. 1925), the court held in a copyright infringement suit that immorality of the copyrighted work as a defense cannot be maintained unless the work was calculated to arouse lust in those who read or viewed it. It is apparent from a review of the earlier cases that there has been no uniformity by the courts in applying standards by which materials are to be judged in determining whether they are obscene.

However, it is the opinion of this court that the pronouncements of the Supreme Court defining obscenity should govern this issue in copyright cases. There is no reason for a national definition of obscenity to be applied in copyright cases when a local standard is applied in criminal obscenity cases. While the Copyright Act is national, so is the First Amendment upon which defenses to criminal obscenity charges are founded.

At the time this movie was produced and registered with the Patent Office the Roth-Memoirs guidelines were the tests utilized in determining obscenity. For a matter to be obscene under those guidelines it was required that (1) the dominant theme, taken as a whole, appeal to a prurient interest in sex; (2) the material be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material be utterly without redeeming social value. Shortly after this movie was filed with the Copyright Office, the Supreme Court handed down its decision in Miller v. California. In that case the court held that the guidelines for determining whether material was obscene were (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole lacks serious literary, artistic, political or scientific value. Since this movie was produced when the Roth-Memoirs guidelines were in effect but was exhibited by the defendants when the Miller guidelines were in effect,

an issue is raised as to which guidelines should be utilized at this time in determining whether the movie is obscene.

In United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973), cert. denied, 418 U.S. 932, the Fifth Circuit held in a criminal prosecution under a federal obscenity statute that if the acts charged occurred while the guidelines enunciated in Roth-Memoirs were effective but the trial occurred while the guidelines enunciated by Miller were effective, then the defendant was entitled to the benefit of both guidelines. If materials were found not to be obscene under either guidelines then the prosecution could not prevail. This holding was affirmed in United States v. Linetsky, 533 F.2d 192 (5th Cir. 1976). In applying the standards in this case the court will look both to the Roth-Memoirs and the Miller guidelines and if the movie is not obscene under either it should have copyright protection.

At the trial of this case neither party utilized the services of an expert on the obscenity issue. This court, therefore, must determine this issue based on its viewing of the movie and applicable Supreme Court guidelines. The court finds that the movie is obscene under the guidelines of both Roth-Memoirs and Miller. The copyright covering the movie is not entitled to the

protection from infringement by the defendants.

For the foregoing reasons, the court is of the opinion that all relief sought by the plaintiffs herein should be denied. A judgment will be entered accordingly.

Dated this 2nd day of September, 1976.

Robert M. Hill (signature)
United States District Judge

APPENDIX D

Continuity for the Motion Picture Film

"Behind The Green Door"

. . . . D-1 through D-37

Reference: Amicus Curiae Brief at page 63, footnote 12.

CONTINUITY FOR

"BEHIND THE GREEN DOOR"

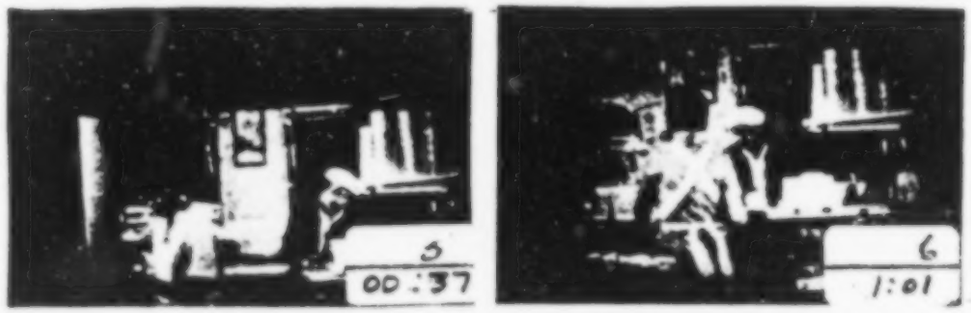
SCENE I

(Opens in diner - truck stop. Two men seated, woman behind counter. Two men greet each other.)
/5/ /6/

1ST MAN: "Hey!"

2ND MAN: "Hi, Gary. How you doin'?"

1ST MAN: "O.K. Kid."



WOMAN: "Hey, Kish - your buddy's here."

(Man appears wearing white apron and chef's cap. He is owner or operator of diner.)

KISH: "Hi, guys."

2ND MAN: "Hi ya!"

KISH: "Hey, did you hear the radio?"

MAN SEATED: "No, what?"

2ND MAN: "Ya got me?"

KISH: "They got an Italian hijacker up there. Yeah. He just ordered two dollars and

5,000 parachutes." /7/

(Others laugh)

1ST MAN SEATED: "How about some more of your old coffee?"

KISH: "Yeah, I guess we can spare a little of that. Hey, listen, I got you two guys together now. I want to hear that story about that green door you've been promising me. /8/

It's been a long time. How about - telling me what happened there, huh?" /9/

1ST MAN: "I don't know what do you think?"

2ND MAN: "You tell him."

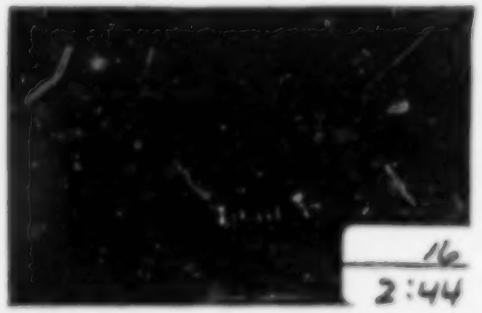
1ST MAN: "Nah, nobody tells it like you do."

2ND MAN: "Kish, I'll tell you, - warm up my coffee and I'll tell you the story."

KISH: "O.K., O.K."

SCENE II /13/

(Opens on highway. Small open sports auto - with a woman driving along a winding road in a mountain area.) /14-15-16-17-18/



(Alternate shots of girl's face and road.) /21/

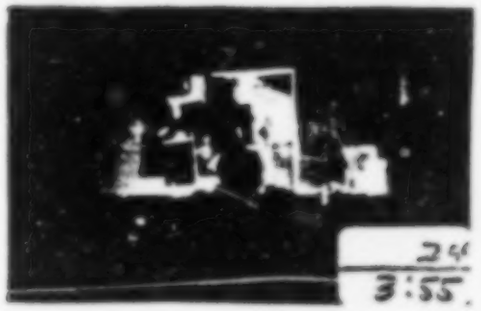
SCENE III

(Face of man at counter, smiling) /23/

MAN: "Thank you very much. I hope your stay with us will be very pleasant."

(Phone rings in a room; a man answers.) /24/

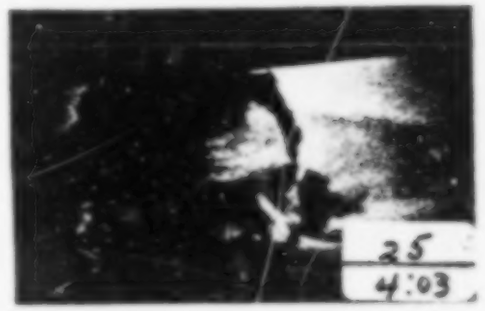
MAN: "She's here."

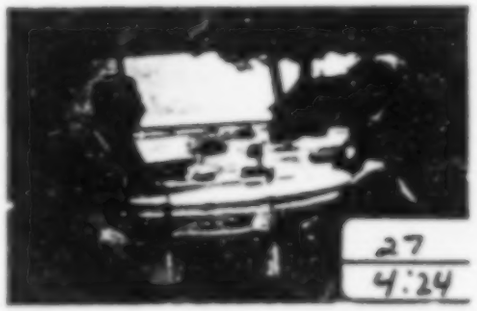


SCENE IV

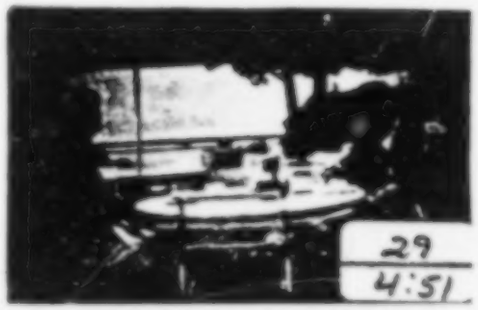
(Two men seated. Same two who were seated in the diner in Scene I. Older man is recounting his experiences at a resort.)

OLDER MAN: "It's funny you got the job. /25/ So I give him - give him six bucks and I took the bus the short line bus up to Swan Lake in mountains - taking a bus so I hitchhiked over to - up to the little resort see - the little resort - was called Cinders In The Pines. Jeez, I came there, there was no pines there. Everything was burned down. See, Jeez, it looked bare as hell quick and at 3 O.K. I was sittin' /27/ on the dining - on the dining room hall on the porch waiting to get in to - hit - to hit the groceries - Man, how I ate, hm! hm! like the last day on earth. Sour cream and borscht, and herring and chicken and bananas. Yeah, the bus boy - the bus boy used to plead with me, - to talk with the hey for God's sake, give us a break - please will





you leave the table? I mean we gotta clean for the next meal, get out, will ya? So I get out. I load my pockets with bananas. /29/ and I have bananas hanging out my pockets like six - six shooters - he says, 'give me a break, will you', and he says, 'by the way, have you been in the water? Since you been here? - eh, since you been here?' I says 'no - what do you mean today?' He says 'no, since you been here, have you been in the water? I said 'No!' He said, 'well, you better - your wife's here, mate'" (voice fade out)



(Voice fade in) ". . . the top of the rope to the inner tube, and I dropped the rope down and I tied a stone on the other end, so I get that rubber inner tube and tie the top of the rope to the inner tube. I drop the rope down and on the other end of the rope I put a big stone. On the right side of the inner tube, I tie a rope and tie it to a tree on the beach. On the left side of the inner tube, I take a piece of rope and I tie it. I create a lagoon, see - then I get a big sign and I put it up and it says 'beyond this point is dangerous - poisonous frogs,

snapping turtles.'" /33/

(Music up) (Woman, who was in small sports car (Scene II) enters and sits at a table. Music over man's voice as he continues to recount his experiences. Scene continues - two men talking, music in background.) /37/ /40/

MALE VOICE: "She come down to the beach . . . We were dancing there in the Recreation Hall . . . at night see . . . so she's down on the beach, rolling around in the water . . . the lagoon, you know . . . don't let me go . . . voices fade into background.

SCENE V

(Sound of crickets) (Night at resort area. Woman descends outdoor stairway. Auto approaches quickly and stops. Several men get out of auto and seize the woman. She screams. /42/

They force her into the car and drive off. One of the men who assisted the others runs after the auto /44/ shouting:

1ST MALE: "Hey!"

2ND MALE: "Get her in!" "Hey! Hey! You son of a bitch, stop."

SCENE VI /47/

(Inside plush room - two men, same as in Scenes I - IV, appear here. They wait for an attendant. A large man approaches the two men, while passing a football from one hand to

the other /50/. He stands directly in front of the two. He squeezes the football until it explodes. He then questions the two men.

MAN: "Wait a minute, Harry!"

BIG DOOR MAN: "What do you two want?"

YOUNGER MAN: "Oh. Barry Clark. Reservations for two."

BIG DOOR MAN: "References?"

YOUNG MAN: "John Stewart." /52/

BIG DOOR MAN: "You've been here before, Clark, - you know the rules. And tell 'em to your buddy, /53/ too." (As he puts masks on the two men, he then turns to a woman and says, "Escort these gentlemen to their seats, Coco."

COCO: "Be my pleasure. Follow me,

please." (Big man laughs.) /54/

SCENE VII /55/

(Interior of club. An audience is seated - camera pans past a black man standing erect with arms folded, in tights. A clown is performing on stage. /57/ /60/

SCENE VIII /61/

Auto entering street stops. Kidnapped woman is removed from auto and taken into a building.

SCENE IX

Woman is led into a room where another woman is waiting for her. The woman orders abductors to leave.

WOMAN: "That will do. /65/ Leave us." She walks over to the girl.

WOMAN: "Don't be afraid. /67/ You poor child. I know exactly how you feel, but please believe me, no one's going to hurt you. Now, Gloria, I'm going to tell you everything that's going to take place, so there's /69/ no need to be frightened. But, first, you must try to relax, please. You're trembling. Here, baby, let me try to relax your body. /70/ Sit down, there, that's a good girl. You're freezing. Let me try to warm

you. Gloria, please try to relax. Calm down. Everything's going to be all right, I promise you. Nothing to be afraid of — you know, a long time ago I lay on this very same bed as you are now, /73/ and I felt exactly the way that you do, and a kind and lovely woman came in and she administered to me, as I am going to do to you. /74/ She prepared me for the most exquisite moment in my life. Try to relax your toes, Gloria. Feel the tingle - relax them one by one - until they are totally and completely relaxed. Now try to imagine this feeling creeping slowly, ever so slowly up into your feet until they feel they don't really belong to your body, but exist independently. /77/ That's it. Now, your calves - try

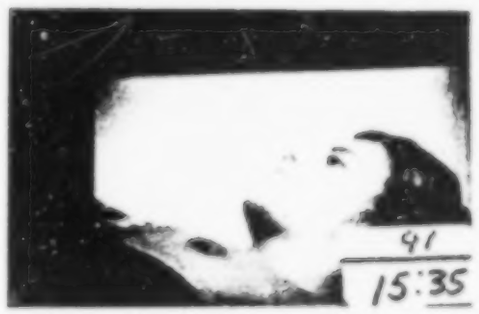
to /78/ think of them as part of your feet - warm and heavy. /79/

It would be very difficult for you to move them. Concentrate, Gloria. Concentrate /80/ on your legs, now extend these feelings up into your thighs. /81/ Think about your thighs, how

light they seem - as if they float on nothing. /82/ Such a lovely child. Lie still, and think of your body and how good it feels, and think only of how you want to entrust your body to my care. I'm your friend, and you can be assured of my loving compassion. See how the muscles of your belly

soothe under my touch, melting, without form or shape - floating over your vitals - ever so lightly in space. Now your arms, /86/ light as air - feel them floating; floating with the rest of you. That's my good girl. Your breasts, Gloria - sensations that you've been feeling through the rest of your body traveled, and now envelope you entirely. /89/ Your breasts will begin to feel warm, and your nipples tingle with /90/ anticipation. Feel the

nipples grow erect. /91/ And the pleasure that you feel from them will go to your very depths and



consume you." /93/

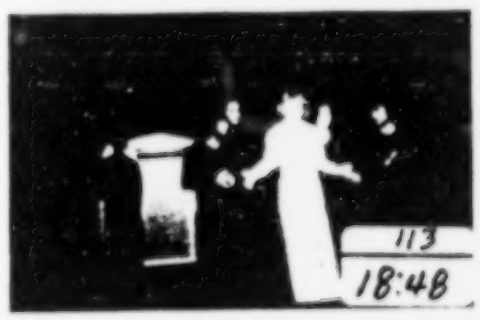
SCENE X /94/

(Clown, in spotlight, on stage in large room (as Scene VII) panto-miming, /95/ after /100/

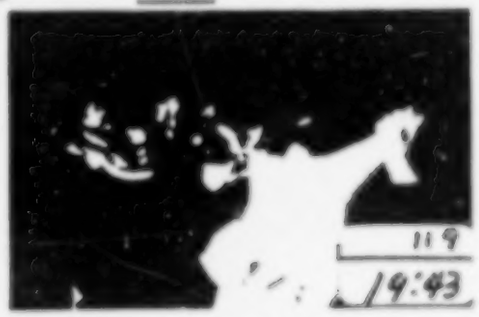
which /102/ /105/ a "voice over" beings.)

VOICE: "Ladies and gentlemen, you are about to witness the ravishment of a woman /107/ who has been abducted. A woman whose initial fear and anxiety has mellowed into curious expectation, although at first her reactions may lead you to believe she is being tortured, quite the contrary is true. For no harm will come to those being ravished. In the morning she will be set free, unaware of anything except that she has been loved as never before. /113/

Perhaps you will recognize one of your friends in the role of victim. Remember you are sworn to observe silence. If you break this rule, you will be dealt with severely. So, with the knowledge that you are /115/ powerless to stop the performance, just relax - enjoy yourself to the fullest extent."



Focus on green door, with spot. Door opens. Girl in Scene IX, who was being administered to, is escorted through the door by several /116/ women attired in dark robes with their hands in a prayer-like position. They then proceed to center stage. They undress the young woman while simultaneously /118/ rubbing her body all over. The young woman /119/ is held with legs and arms outstretched /122/ in a standing position. The female attendants then begin carressing and sucking her body /124/ in the sensual areas,



as the camera in varied and diverse angles focuses on a female performing cunnilingus /125/. The girl being fondled has a look of fright and dismay /128/ which gives way to passive

acceptance. Heavy breathing is heard /153/ of all participants in the /163/ acts. /193-194/

/204-211-213-220-235-237/

The camera returns again to the spotlighted green door.

SCENE XI /238/

Black man enters through the door. /240/

His upper torso is nude. He is wearing white stretch pants, cut out exposing his erect black penis.

/244/ As bongos sound in the background, the black man walks deliberately /246/ toward the young girl, who is

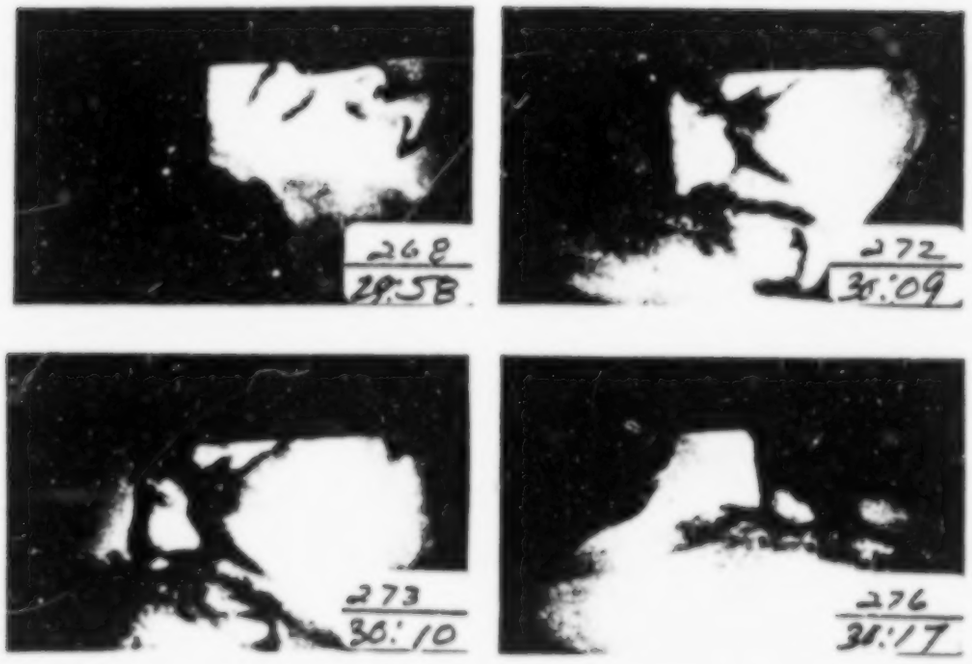
now lying prone, with her rectal and vaginal areas fully exposed and open to a frontal view.

The camera focuses directly on her vagina. /248-251/

The black man moves toward the prostrate girl as the several women attendants hold her. As the man approaches the reclining girl, the attendants beckon him on, pointing to her vagina, encouraging him to indulge. The man kneels, places his palms on her groin area, right and left, then slowly places his mouth on her vagina /258/ and begins cunnilingus. /262/

The close proximity of the camera to the act graphically depicts the act of cunnilingus. /264/

/268-272-273-276/

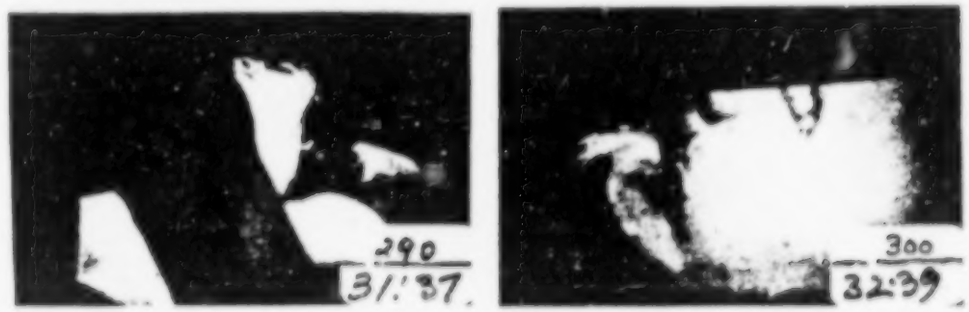


Sounds heard after the bongo music is no longer audible are "WOW . . . WOW!"

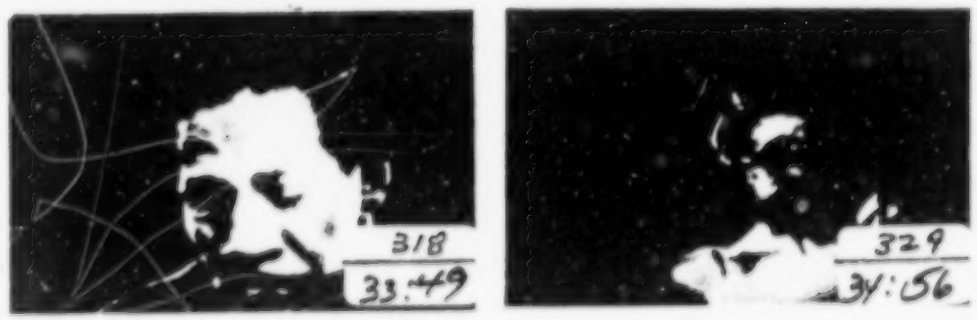
This activity continues for several minutes, during which various closeups of the audiences masturbating as they watch, are shown. Moans and heavy breathing are heard. /277/ /278/

The black man directs his penis (closeup) /280/ towards the girl's vagina, /282/

penetrates and begins intercourse while tonguing her mouth. /290/ He performs /300/ sexual intercourse to the beat of a bongo drum.



As he speeds up, /318/ so also does /329/

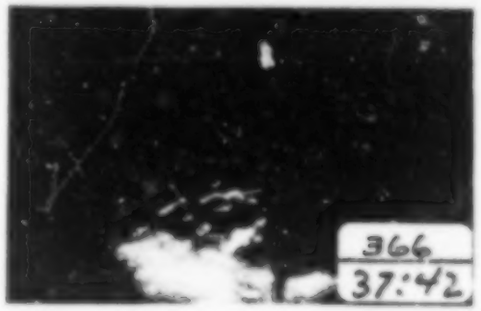


the tempo /334/ of the bongo /340/ beat.

The girl becomes /356/ ecstatic and raises her legs up around the man's hips. /361/

/365/ Her ecstatic sighs and screams increase in intensity and loudness and culminate in her sexual climax. /366/

The black man withdraws his penis as camera closeup fills most of the movie screen.



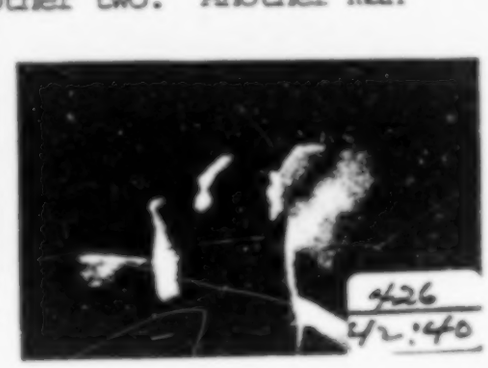
SCENE XII /378/

Appearing on the screen, a trapeze type harness device with circular openings at the ends descends from the ceiling by a rope and is lowered to stage level.

Three men mount the device /382/ and allow the cylindrical /383/ appendages to support their lower buttocks. Their genitals are fully exposed.

/393/ The girl is carried toward the three men, vaginal area and rectum directly in front of the viewer.

/403/ She is lowered into position so her mouth is in front of the black man's penis. She copulates him orally while her two arms are raised so as to grasp the penis of the man on her right with her right hand and the penis of the man at the left with her left hand. She begins simultaneously to perform /417/ oral sodomy while masturbating /426/ the other two. Another man



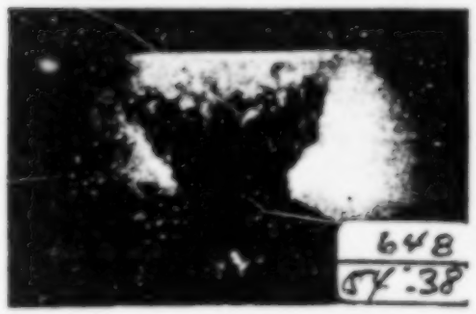
is placed below the girl and penetration into her vagina is made, completing /436/ the quadrasexual act of oral sodomy, masturbation and sexual intercourse all at one

time. /474/ /477/

Within the same room /484/ acts of group sex take place. Two and three doing various acts at once - e.g., one party, anal sodomy, while the party being sodomized performs cunnilingus. /510-539-543-550/

/555/ /625/

/648/ Full closeup of penis /650/ -



/651-655/ repeatedly entering the vagina totally

filling the screen
as sighs and moans
are heard. /656/

The penis is withdrawn as semen is seen to
ejaculate in throbbing fashion. /658-661-662-666/

After this display, a slow motion process
takes place where the girl is positioned directly
/670/ below a fully /672/ erected penis, - in

slow motion and with strange, unusual high-pitched

sound in background /707/ /708/ - the climax is

attained and semen is ejaculated into the woman's face and open mouth. The emission (in slow motion) spurts out of the end of the penis, flowing /721/ down over the testicles and into the woman's face and mouth. This spectacle /725/ is repeated

over and over, fully enveloping the screen. The man then takes /733/ his penis by the hand and wipes /735/ the semen all over the girl's face

and neck. /737/ /741/

Then follows a sequence of negative exposures of semen dripping /752/ into the female's mouth and /753/ another shot of the substance pouring into

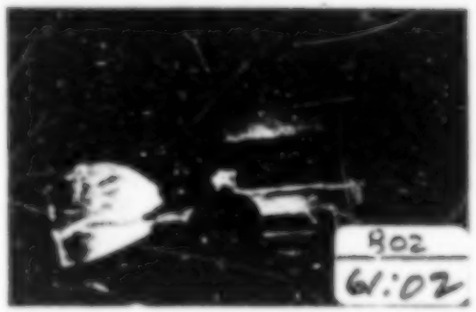
the female's mouth in a thick stream. /789/ /790/

Younger man of the two men in Scene VI dashes to the stage, picks up the girl who was featured, and carries her off quickly

behind the green door. /801/

SCENE XIII /802/

(Back in the diner)



OLDER MAN: "He (indicating the other younger man seated on his right) went through the green door that was the last I saw of him."

MANAGER: "Well, what happened, Ed? Huh?"

YOUNG MAN: "Some other time, Kish - see ya around buddy." (Exits)

OLDER MAN: "O.K. Boo Boo - goodnight."

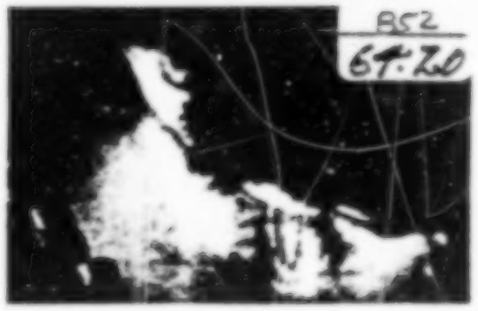
SCENE XIV

(Younger man is driving truck, day-dreaming. The young woman appears again—lying down facing a penis, /812/ which she commences to

/819/ orally copulate. /826/

/833-840-846-847/

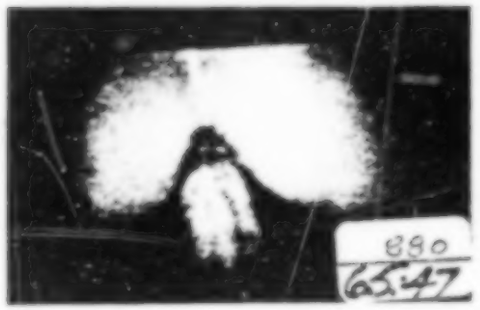
Young man performs cunnilingus. /850/ Full screen view of the vaginal area as male commences cunnilingus. /851/ /852/

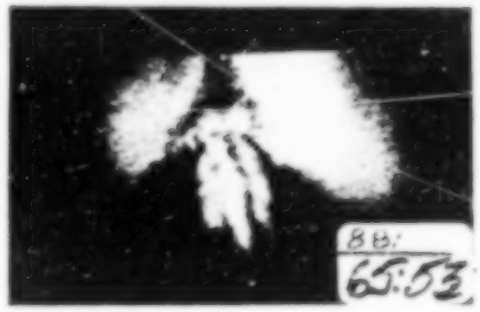


/854-857-859-864/

Repeated shots of penis penetrating the vagina. /877/

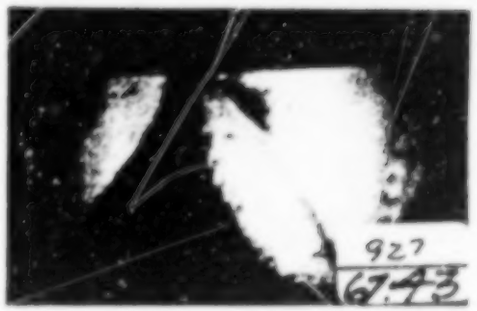
Full /880/ closeup /881/ filling the screen.





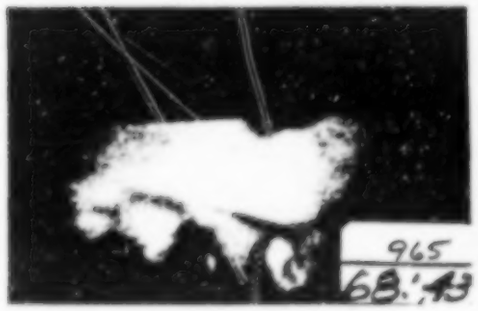
View of man, mouth to mouth, tongue to tongue, with the young woman. Heavy sighing. /895/ /898/

/902-912-917-927/



Short breathing, heavy and deep. END.

TRAILER showing scenes /965/ of preceding sexual activities, /993/ orgies,



/1002/ ejaculation into girl's face, lesbianism, oral copulation, cunnilingus, as credits appear.

/1026-1027-1031/

/1037-1040-1043/

APPENDIX E

Time and Motion Study

For the Motion Picture Film

"Behind the Green Door"

. . . . . 15 pages
(1043 photos)

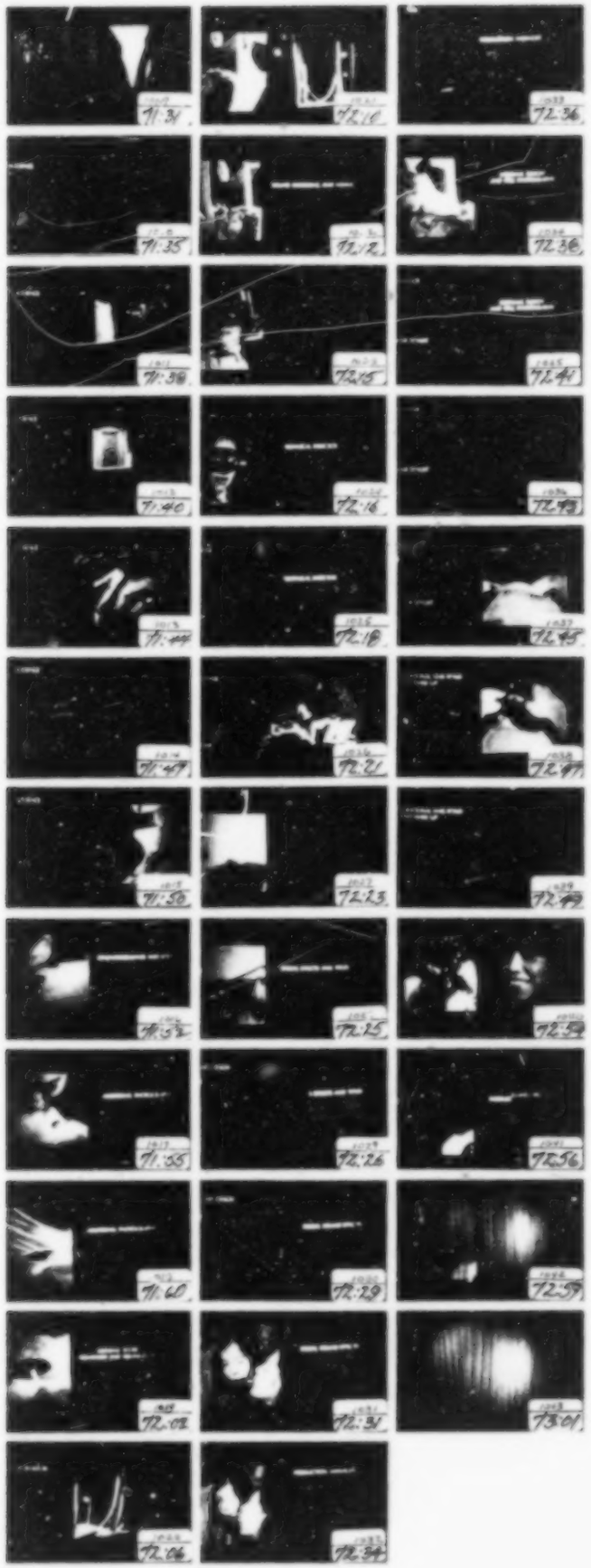
Reference: Amicus Curiae Brief at page 64, footnote 13.

(721-741) PENIS EJACULATES INTO NECK OF FEMALE. MALE HOLDS PENIS TO MOUTH OF FEMALE. FEMALE OPENS MOUTH AS MALE HOLDS PENIS SO SEMEN CAN DRIP INTO IT. HE RUBS PENIS AGAINST HER NOSE, MOUTH AND CHIN. (742-768) FILM PROJECTION IS REVERSED TO CREATE IMAGE IN NEGATIVE FASHION SHOWING SEMEN SPURTING FROM PENIS AND FLOWING INTO MOUTH OF GIRL. (769-792) FILM REVERTS TO REGULAR PROJECTION. PENIS EJACULATES SEMEN IN FACE OF GIRL, SHE LICKS SEMEN FROM PENIS.

(793-794) GIRL LICKS PENIS. [illegible] SEX ORGY. [illegible] MAN [illegible] UP GIRL AND [illegible] ... [illegible] YOUNG MAN LEAVES [illegible] ... GIRL WHO WAS VICTIM OF SEX ORGY AGAIN APPEARS PERFORMING ORAL COPULATION ON PENIS. FULL SCREEN CLOSEUP. [illegible] MALE PERFORMS [illegible] - FULL SCREEN CLOSEUP.

(865-870) CUNNILINGUS. (871-[illegible]) SEXUAL INTERCOURSE GIRL ON TOP. FULL SCREEN CLOSEUP OF VAGINAL PENETRATION. ([illegible]-[illegible]) SEXUAL INTERCOURSE GIRL BENEATH MALE.

(91[illegible]-99[illegible]) SEXUAL INTERCOURSE MALE ON TOP. [illegible] APPEARS [illegible] AT THE [illegible]. MALE APPEARS AS AT THE BEGINNING. CLOSING CREDITS APPEAR.



(1009-1043) CREDITS CONTINUE ALONG WITH SELECTED SCENES OF PREVIOUS SEXUAL ACTIVITY AND ORGIES. THE END.

APPENDIX F

Reference: See Brief Amicus Curiae at page 67 and 68 footnote 14.

HANS CHRISTIAN ANDERSEN

FAIRY TALES

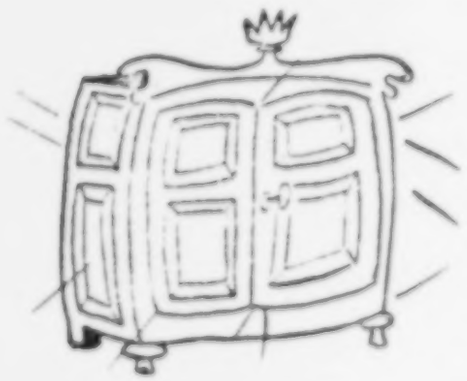
TRANSLATED BY
Marie-Louise Peulevé

ILLUSTRATIONS BY
Svend P. Jørgensen

SKANDINAVISK BOGFORLAG

The Emperor's New Clothes

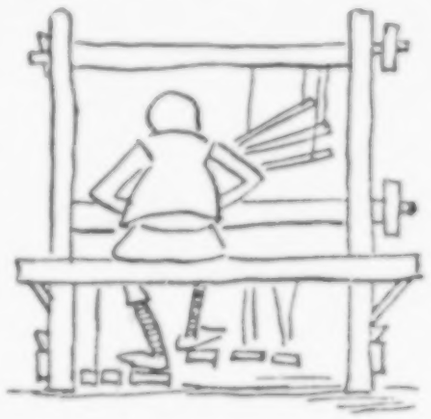
Many years ago there was an Emperor who was so extremely fond of beautiful new clothes that he spent all his money on being superbly dressed. He took no interest in his army and it was only to show off his new clothes that he went to the theatre or for a drive in the country. He had a garment for every hour of the day, and just as you may say of a king, "He's in his council," it was always said of this Emperor, "He's in his wardrobe".



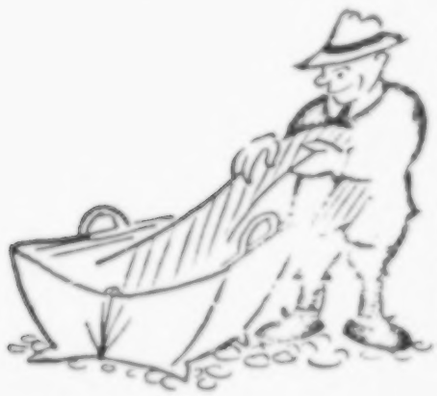
The big city, where he lived, was full of life and activity, and strangers were continually arriving. One day two swindlers turned up; they pretended to be weavers and claimed that they knew how to weave the most beautiful

materials imaginable. Not only were shades and patterns of a rare beauty, but the clothes made from this fabric had the strange quality of being invisible to any person who wasn't fit for his position or else was stupid beyond excuse.

"Why! They must be wonderful clothes," said the Emperor to himself, "wearing them I could find out if any of the men I employ are unfit for their post, and I can distinguish between the clever and the stupid. Yes, they must weave that cloth for me at once." Then he gave them a lot of money in advance so that they could begin to work.



At once they put up two looms and pretended to be working, though in fact the loom was quite empty. They had the cheek to demand the purest silk and the costliest gold thread, which they tucked away in their own bags, and then set to work on the empty looms and that until the small hours of the night.

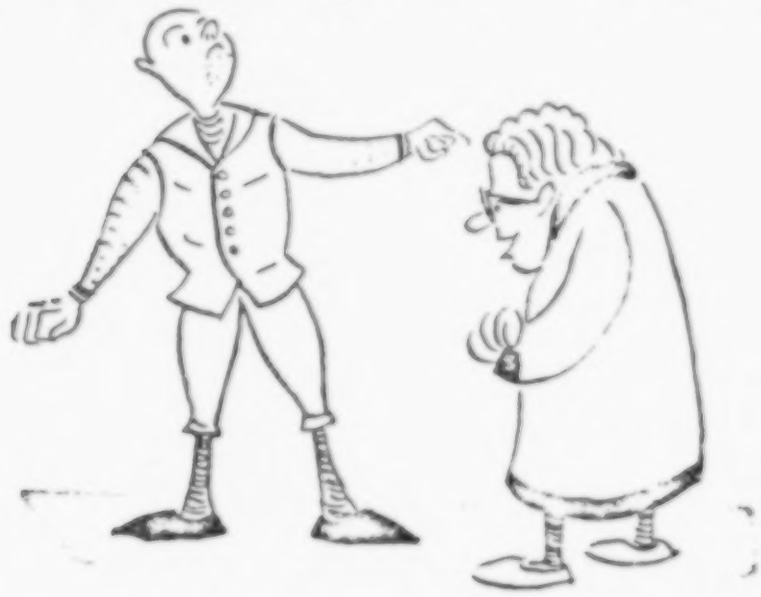


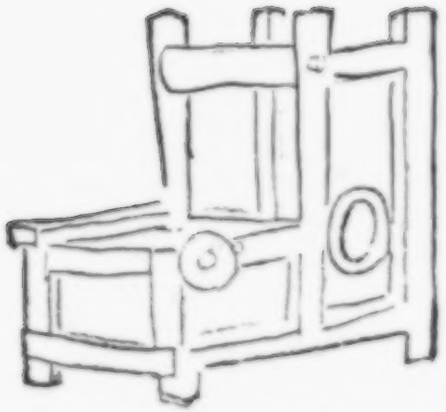
"Now I should like to know how they are getting on with the cloth," thought the Emperor, but he did feel rather ill at ease knowing that those who were stupid or unfit for

their post wouldn't be able to see it. Still, for his own part he was confident that he didn't need to worry, but all the same he would rather send someone else first to see how things were. All over the town people knew about the magic power of this cloth, and they were all keen on seeing how incapable or stupid their neighbours were.

"I'll send my honest old premier to the weavers," thought the Emperor, "he's the best one to see what the material looks like, for he's clever, and nobody could be better suited to his post than he is."

Now the kind old premier entered the hall where the two swindlers sat working the empty looms. "Good gracious me!"



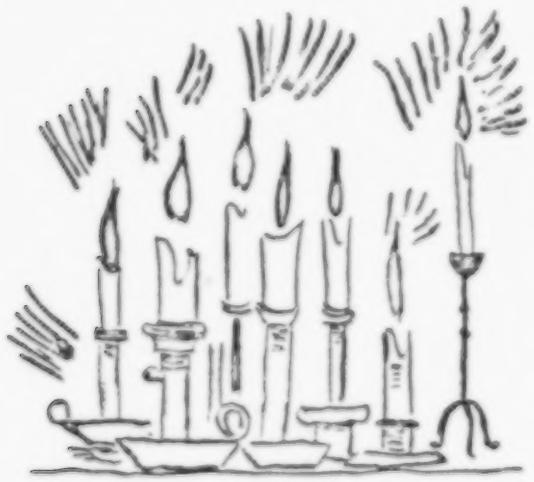


thought the old premier opening his eyes wide, "I can't see anything."

But of course he didn't say so.

The two swindlers invited him to inspect the loom and asked if he didn't find the colours and the design quite perfect? They pointed to the empty loom, and the poor old premier opened his eyes even wider than before, but he couldn't see anything – for there wasn't anything to be seen. "Dear me," he thought, "Could I really be stupid? I never thought so, no one must get to know! Could it be that I am not fit for my post? No, it'll never do to tell them that I can't see the cloth."

"Well, what is your opinion?" asked the one who was pretending to weave.



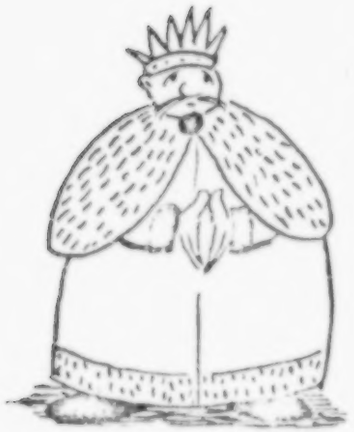
"Oh, it's so pretty, quite ravishing," said the old premier looking through his glasses, "what a design and what colours! Indeed, I'll tell the Emperor that I'm very satisfied."

"Ah, we're pleased to hear that," said the two weavers, and now they named the colours and explained the unu-

sual design. The old premier listened carefully that he might be able to repeat everything to the Emperor, and so he did.

Now the swindlers demanded more money, and more silk, and more gold thread; they needed it for the weaving. Everything went straight into their own pockets, not a thread was placed in the loom, but still they continued as before, working the empty loom.

Soon after the Emperor sent another honest official to see how the weaving was getting on, and whether the cloth would be ready soon. He had the very same experience as the premier, he looked and looked, but as there was nothing but the empty



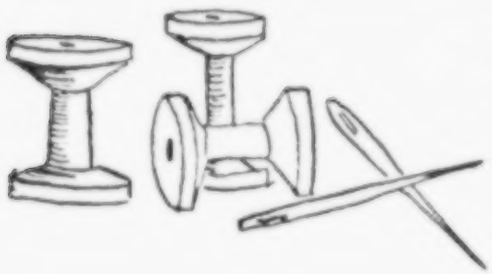
looms, he saw nothing. — "Look, isn't it an attractive piece of cloth?" asked the two swindlers, and they carefully explained the magnificent design which wasn't there at all.

"I know I'm not stupid," thought the man, "so it must be my good position I'm unfit for. That's very strange, but I mustn't let anyone know." So he praised the cloth that he didn't see, and he expressed his delight in the beautiful colours and the wonderful design. "Yes, it is unbelievably lovely," he told the Emperor.

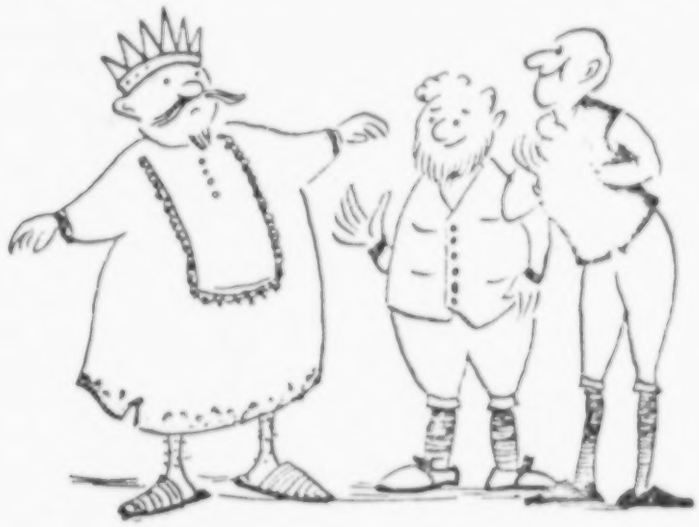
The whole town was now discussing this splendid material.

Now the Emperor decided to see it himself, while it was still in the loom. Together with several select people — among them the two honest, old officials who had been there before — he went to see the cunning swindlers who were now weaving with all their might, but still without thread.

"Look, isn't it magnificient?" said the two honest officials. "Have Your Majesty seen the pattern, the colouring!" Then they pointed to the empty loom, because they thought that all the other people could see the material.



"What ever is this?" thought the Emperor, "I can't see a thing! This is terrible, am I really stupid? Am I not fit to be Emperor? This is the most frightful thing that could happen to me!" — "Why yes, it is very beautiful," the Emperor said, "it has my imperial approval." And he gave a benevolent nod as he looked at the empty loom; he wouldn't admit that he couldn't see anything. His entire escort gazed and gazed, but they made no more of it than all the others, but like the Emperor they all exclaimed, "How very beautiful!" Now they advised him to have a garment cut from this wonderful material and wear it for the first time in the grand procession that was to take place very soon. "It's magnificent, superb, out-



standing!" they all said to one another, and they were all incredibly pleased with it. The Emperor conferred a knigthood on each of the swindlers and gave them a cross to wear in their button-holes as well as title of Imperial Weavers.

The entire night preceding the procession the swindlers sat working with more than sixteen candles lit. People could see they were busy getting the Emperor's new clothes ready. They pretended to take the material off the loom, they cut away at the air with big scissors, and they sewed with needles without thread, and at last they declared, "Look! The clothes are all ready now."

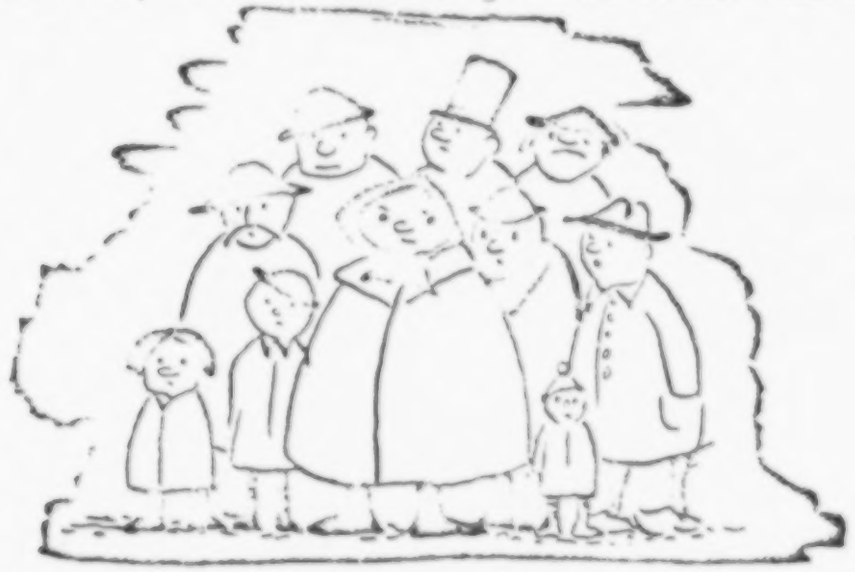
The Emperor went personally to the weavers escorted by the most distinguished courtiers, and the two swindlers each held out their arm as if they were holding something and said, "Look, here are the breeches – here is the robe – here is the mantle." And so on. "They are all as light as gossamer, you can hardly feel that you are wearing anything, but that's just the fine thing about them.

"To be sure", said all the courtiers, but they couldn't see a thing, for there wasn't a thing to be seen.

"If now Your Imperial Majesty most graciously will take off your clothes," the swindlers said, "then we'll fit you with the new ones in front of the big looking-glass."

The Emperor took off his clothes, and the swindlers pretended to hand him one by one the new garments they were supposed to have made, and they pretended to be fastening something at his waist – it was the train, and the Emperor turned and twisted in front of the glass.

"Heavens, how well they suit Your Majesty, and what a perfect cut!" they all said. "What a design! What colours! What a



precious garment!" – "They are waiting outside with the canopy that is to be carried above Your Majesty in the procession," announced the Master of Ceremonies.

"Good", said the Emperor, "I'm quite ready." "Isn't it a perfect cut?" And he turned round once more in front of the glass to give them the impression that he really was admiring his fine garment.

The chamberlains who were to carry the train fumbled about on the floor as if they were picking up the train. They walked along with outstretched hands in order to hide the fact that they couldn't see anything.

Now the Emperor was walking in the procession under the beautiful canopy, and all the people in the street and at the windows cried, "Goodness, how the Emperor's new clothes look marvellous! What a splendid train on his mantle! What a perfect fit!" Nobody would admit that he didn't see anything, because that was as good as saying that he wasn't fit for his job or else that he was stupid. Neved before had the Emperor's clothes been such a success.

"But he hasn't got anything on!" cried a little child. "Gracious me, did you hear what this innocent child said?" exclaimed the father, and they whispered from one to the other what the child had said.

"He hasn't got anything on! A little child is saying that he hasn't got anything on!"

"Why! He hasn't got anything on!" everybody shouted at last. The Emperor felt terribly embarrassed, for it seemed to him that people were right, but he thought to himself, "I've got to go through with the procession." And he carried himself even more proudly, and his chamberlains walked behind him carrying the train that wasn't there.